Supreme Court, U.S.
FILED

No. 09-875 JAN 19 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSHUA ELI RAFF,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

PETITION FOR WRIT OF CERTIORARI

DAVID V. KIRBY
BARBARA E. O'CONNOR
O'CONNOR & KIRBY, P.C.
174 Battery Street, 3rd Floor
Burlington, VT 05401
(802) 863-0112
David@KirbyOConnor.com

JOSHUA C. NEEDLE
Counsel of Record
JOSHUA C. NEEDLE, ESQ.
171 Pier Avenue, No. 192
Santa Monica, CA 90405
(310) 428-1092
jcneedle@vzavenue.net

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Petitioner Joshua Raff was detained by a police officer, and when asked inquisitorial questions, stood silent. He was immediately handcuffed and formally arrested. He did not testify at trial, yet this silence was the subject of testimony by the police officer during the state's case-in-chief and argument by the prosecutor to the jury that they should affirmatively consider it as evidence of guilt.

The constitutionality of using silence in this fashion was specifically left undecided in *Jenkins v. Anderson,* 447 U.S. 231, 236, n.2 (1980): "Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment" and has resulted in a split of decisions among the Circuit Courts and the courts of several states.

The question presented is plain and fundamental:

Does the state violate a Defendant's Fifth Amendment "right to remain silent," as applied to the states by the Due Process Clause of the Fourteenth, by 1) eliciting testimony from the arresting police officer in their case-in-chief and over objection that during his initial detention the defendant said nothing in response to the officer's inquisitorial questions, and 2) the prosecutor arguing to the jury that such silence should be affirmatively considered as substantive evidence of his guilt?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Petition for Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	2
Preliminary Statement	2
Statement of the Case and Facts	4
A. Procedural History	4
B. Statement of Facts	6
1. The Robberies	6
2. The Traffic Stop and Questioning Resulting in Petitioner's Silence	7
C. Facts Specific to the Constitutional Issue Presented	10
Reasons for Granting this Petition	12
A. Constitutional Foundations: This Court has declared that an individual has the "right to remain silent" in all interactions with the police	13

TABLE OF CONTENTS – Continued

Page

B. The Conflicts Among the Circuits and the State Courts: There are at least three conflicting approaches to the state using silence as affirmative evidence of guilt. This has caused unequal and disparate treatment of defendants throughout the nation 18

C. The Need For a Clear Decision From This Court is Plain 24

Conclusion 20

Appendix

Unpublished Opinion of the California Court of Appeal, Second Appellate District ..... App. 1

Order of the California Supreme Court Denying Discretionary Review ..... App. 22

Trial Transcript Excerpts ..... App. 23

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

Berkemer v. McCarty, 468 U.S. 420 (1984).....15

Dickerson v. United States, 530 U.S. 428 (2000).....16

Doyle v. Ohio, 426 U.S. 610 (1976).....16, 18, 24

Fletcher v. Weir, 455 U.S. 603 (1982).....17, 22, 24

Florida v. Royer, 460 U.S. 491 (1983).....4

Griffin v. California, 380 U.S. 609 (1965) 25, 26, 27

Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004) 15

Hoffman v. United States, 341 U.S. 479 (1951) 13

Jenkins v. Anderson, 447 U.S. 231 (1980).....*passim*

Kastigar v. United States, 406 U.S. 441 (1972).....13

Malloy v. Hogan, 378 U.S. 1 (1964) 5, 13, 25

Miranda v. Arizona, 384 U.S. 436 (1966) 2, 14, 26

Quinn v. United States, 349 U.S. 155 (1955).....13

United States v. Hale, 422 U.S. 171 (1975).....14, 18

FEDERAL CIRCUIT COURTS OF APPEAL

Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000).....19, 20, 21

United States v. Green, 541 F.3d 176 (1st Cir. 2008).....22

TABLE OF AUTHORITIES – Continued

Page

United States v. Moore, 104 F.3d 377 (D.C. Cir. 1997) 21

United States v. Pando Franco, 503 F.3d 389 (5th Cir. 2007) 21, 22

United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991) 22, 23

STATE COURTS

Hennessy v. State, 268 S.W.3d 153 (Tex. App. Waco, 2008) 24

Weitzel v. State, 863 A.2d 999 (Md. 2004) 23, 24

CONSTITUTION

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV 2, 5, 15, 25

STATUTES

28 U.S.C. §1257(a) 1

California Vehicle Code §27315(h) 7

RULES

Sup. Ct. R. 10(b) 12

Sup. Ct. R. 10(c) 12

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

PETITIONER prays that a Writ of Certiorari issue to review the decision of the California Court of Appeal, Second Appellate District, entered in this cause on July 15, 2009. The California Supreme Court denied Review on October 22, 2009.

OPINIONS BELOW

The opinion of the California Court of Appeal is unpublished and appears at App. 1-21. The order of the California Supreme Court denying review is unpublished and appears at App. 22.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a), because the decision of the California Court of Appeal denied the defendant a "right . . . or immunity . . . claimed under the Constitution . . . of . . . the United States." This Petition is timely filed within 90 days of the October 22, 2009 denial of review by the California Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PRELIMINARY STATEMENT

This Petition raises the issue left undecided in *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980), of "whether or under what circumstances prearrest silence may be protected by the Fifth Amendment." This issue has remained unaddressed by this Court for nearly 30 years. The question of whether pre-arrest silence can be used against a non-testifying defendant as affirmative evidence of guilt has created a three-way split among seven of the Circuits. It has

also created a substantial split in the decisions of the state courts.

The evidential use of prearrest silence in this case perfectly exemplifies the fundamental unfairness of the dilemma presented to a citizen who is even moderately aware of his "rights." This Court has held that a citizen can exercise his privilege against self-incrimination at any time in the face of official questioning. Indeed, in *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court labeled the right the "right to remain silent." "*Miranda* warnings" are so ubiquitous in the popular media that even the most uninformed citizen is aware of his "*Miranda* rights." And yet, when the Petitioner in this case exercised that right by actually remaining silent in the face of police questions, his silence was devastatingly used against him as evidence of his consciousness of guilt. Indeed, the prosecutor summed up on it. Had he verbally "taken the Fifth" to the officer or in front of a Grand Jury or in a civil proceeding, or refused to make a statement after being "*Mirandized*," no use of *any kind* could have been made of it in his criminal trial. But here, by simply remaining silent in the face of questions by a police officer while he was "detained," his exercise of this right was used to convict him.

A definitive ruling by this Court is necessary to clarify the scope of the Fifth Amendment "right to remain silent."

STATEMENT OF THE CASE AND FACTS

A. Procedural History

An Information filed September 21, 2006, charged Petitioner Joshua Raff with three counts of second-degree robbery and with the special allegation (enhancement) that he used a handgun during two of the robberies.

Raff pled not guilty. His co-defendant, Casey Bowen, who was charged in one of the counts with him and with two other robberies, pled guilty on the morning of trial.

In its case-in-chief at trial the prosecution was allowed, over objection, to introduce testimony from a police officer that Raff remained silent when questioned after being "detained" – on the theory that his silence was evidence of consciousness of guilt. Raff did not testify. In summation, the prosecutor argued the theme of consciousness of guilt, including, for example, "[Raff] wouldn't even respond to him. Does that seem like someone who hasn't done anything wrong, didn't know what [was] happening, was innocent to this whole situation?" (App. 33. The Reporter's Transcript of these portions of the trial proceedings appears at App. 23-34.)

The jury convicted Raff of counts 1, 2 and 5 and found the special allegation true. The trial court sentenced him to concurrent terms of two years plus a ten-year enhancement for the use of the gun for a

total sentence of 12 years. He is presently serving that sentence.

Raff's Motion for New Trial included the issue now being presented to this Court. The trial court rejected it without analysis.

Raff timely appealed to the California Court of Appeal, Second Appellate District, and raised this issue. In its unpublished opinion (App. 1-21), the court wrote:

> Raff argues that the prosecution's comments on his silence violated his Fifth Amendment right to due process.[1] We disagree. Raff was not under arrest and Officer Bambrick *was not investigating, nor was he even aware of, the robberies for which Raff was standing trial.* There is a split in the federal courts regarding whether the Constitution is violated when the prosecution comments on a defendant's silence occurring before his arrest and before he received *Miranda* warnings, and uses that silence to argue consciousness of guilt.

(App. 13, emphasis in original.) The court concluded that "[t]he trial court properly admitted the evidence

---

[1] Petitioner actually argued a violation of his Fifth Amendment right not to be compelled to be a witness against himself – his "right to remain silent" – as applied to the states by the Due Process Clause of the Fourteenth Amendment, citing, *inter alia*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

that Raff was silent when questioned after the traffic stop." (App. 14.)

This issue was again raised in a Petition for Review timely filed with the California Supreme Court, which was denied on October 22, 2009. (App. 22.)

This Petition for a Writ of Certiorari is being timely filed within 90 days of that denial.

B. Statement of Facts

1. The Robberies

In the early morning of May 18, 2006, a man wearing a hooded, gray sweatshirt robbed Refugio Gomez at gunpoint as he walked home from work in Santa Monica. (Count 1) The robber demanded his money and car keys. Gomez did not have any car keys. The robber took $65. While Gomez described the robber to the police as a man in his thirties, 5' 6", 160 pounds, he nonetheless identified Raff, *who is 19 years old, 5' 9", 200 pounds*, as the robber at trial.

In the early morning hours of May 21, 2006, a man wearing a hooded, gray sweatshirt robbed Paul Tifford at gunpoint as he approached his car on a street corner in Los Angeles. (Count 5) The robber demanded and took Tifford's wallet containing money and credit cards. While Tifford, who is himself Black, described the robber to police as a "male Hispanic or a Black person," 5' 8", 150 pounds, he nonetheless

identified Raff, who is *Caucasian, 5' 9", 200 pounds,* as the robber at trial.

At approximately 8:30 p.m. on the evening of May 21, 2006, a man wearing a white, hooded sweatshirt and a dark bandana covering his face robbed Michael Silverman as he walked home from a supermarket in Santa Monica. (Count 2) The robber demanded and took Silverman's wallet containing money and credit cards. Silverman identified Raff's former co-defendant Bowen as the robber.[2]

2. The Traffic Stop and Questioning Resulting in Petitioner's Silence

At approximately 9:45 p.m. on May 21, 2006, LAPD Officer David Bambrick and his partner were patrolling the beach community of Venice, California, on the west side of Los Angeles. While stopped at a red light, they looked across the intersection and observed that the two occupants of a silver Kia Optima did not appear to have their shoulder harnesses on.[3]

Noting this "vehicle violation," they made a u-turn and pursued the Kia, which accelerated away

---

[2] Silverman testified that Raff was *not* the robber and was not present. Raff was charged in this count as an aider and abettor.

[3] California Vehicle Code §27315(h) declares a seat belt violation to be an infraction subject to a $20.00 fine for a first offense; no arrest is authorized.

at speeds in excess of the speed limit. As the officers were following – "probably about 100 feet away," – Officer Bambrick saw that Raff, the passenger, "appeared to be as if he was leaning out towards the open window of the passenger side of the vehicle." At that point, the officers lost sight of the Kia for a short period. They followed the Kia around several blocks observing various traffic violations. When the Kia finally stopped, they "turned on [their] red light to conduct a traffic stop."

Bambrick's partner ordered the driver, co-defendant Casey Bowen, out of the car and "recovered a driver's license from Mr. Bowen's pocket" which belonged to Michael Silverman, the victim of the third robbery.

While Bowen was being arrested, Officer Bambrick approached the passenger, Petitioner Raff. "Once I walked up to him and illuminated him with my flashlight, I told him to place his hands – either I told him to put them on his knees or on the dashboard in front of him. And at that point he just stayed in that position." After Bowen was handcuffed "I got Mr. Raff out of the car and detained him."

At that point, Officer Bambrick asked Raff, "Hey. What's going on? You know, what's up with the driving?" Raff remained silent and "just kind of stared straight ahead." He was then immediately handcuffed and placed in the patrol car. Following his arrest Officer Bambrick searched the passenger seat where Mr. Raff had been sitting and found "nothing

that I recall that was significant." In Mr. Bowen's seat, however, he found a black leather wallet belonging to Paul Tifford, the victim of the second robbery.

Officer Bambrick then returned to the location where he had lost sight of the Kia and found a .45 caliber handgun lying on the sidewalk. A magazine for the gun was lying in the gutter nearby.[4]

Though there was a modicum of circumstantial evidence presented that the prosecution argued proved Mr. Raff's guilt – most notably a text message around the time of the Silverman robbery on Raff's phone that even the prosecutor in his argument conceded might not be about the Silverman robbery but "may be referring to Mr. Tifford. . . . I don't know" – the vast majority of circumstantial evidence (the Kia rented to Bowen, the gun stolen from Bowen's neighbor, the sweatshirts in the trunk of the Kia, Silverman's driver's license in Bowen's pocket, the Tifford wallet in Bowen's seat) was all connected to Casey Bowen. The prosecution of Joshua Raff was founded almost entirely on the puzzling eyewitness identifications of him by Mr. Gomez and Mr. Tifford, his presence in Bowen's Kia and his "guilty" silence in response to Officer Bambrick's questions.

---

[4] The victims identified the gun as looking like the one used in the robberies.

C. Facts Specific to the Constitutional Issue Presented.

During the prosecution's case-in-chief and over an objection by trial counsel, the prosecution offered Raff's silence in response to Officer Bambrick's questioning as evidence of consciousness of guilt.[5] At sidebar in response to the objection, the trial court stated, "[T]he fact that he won't give any information as to anything in response I think indicates . . . consciousness of guilt." The court went on to note:

> To me, any reasonable person who is not guilty of a crime would not try to evade. When asked that question, would say something like, "I don't know. My friend just went crazy. He just saw an old girlfriend he – he wanted to get away from her. He thought he was being chased."
>
> I mean, there could be a million different things that an innocent passenger would say under these circumstances. The fact that he didn't say anything, to me, is consciousness of guilty knowledge as to something, objects in the car, the fact that he committed a

---

[5] Counsel objected, and elaborated at sidebar: "If he doesn't answer any questions or anything, why is the question even being asked in front of the jury?" While the objection was not phrased as well as it could have been (App. 27-30), it was expanded in Raff's Motion for New Trial and properly raised in the state courts. The state did not argue waiver and the Court of Appeal ruled on the Constitutional issue, thus preserving this issue for review.

> robbery with this guy earlier that day. I don't know.

(App. 29.)

Pursuant to this ruling, Officer Bambrick testified that while detained Mr. Raff chose to remain silent rather than respond to his questions. The prosecutor's summation compounded the harmful effect of this testimony:

> Officer Bambrick then approaches the [Petitioner], says, "What's going on?" He's looking around nervously. Wouldn't even respond to him. Does that seem like someone who hasn't done anything wrong, didn't know what [was] happening, was innocent to this whole situation?
>
> The Officer said, "Hey. What's going on? What are you guys doing?" Officer Bambrick doesn't know there's a string of robberies going on.
>
> The defendant won't even talk to him. Does that seem like innocent behavior? Absolutely not.
>
> * * *
>
> He knew what was going on when the police stopped him and said, "What's happening? What's going on? What are you guys doing?" and he doesn't even talk.

(App. 33-34. The direct examination, objection, colloquy and ruling, as well as the prosecutor's

summation in this regard, are all set forth verbatim at App. 23-34.)

REASONS FOR GRANTING THIS PETITION

This case provides the Court with an opportunity to decide "an important question of federal law that has not been, but should be, settled by this Court" (Rule 10(c), Supreme Court Rules) that was specifically left undecided in *Jenkins v. Anderson*, 447 U.S. 231, 236, n.2 (1980): "Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment."

This case presents a fundamental yet unresolved issue of Fifth Amendment jurisprudence: Can the state, in its case-in-chief, elicit testimony that a non-testifying defendant remained silent in the face of police questioning and affirmatively argue to the jury that this silence is evidence of guilt?

This seemingly simple question has resulted in serious conflicts among the federal circuits and among the state courts. The California Court of Appeal's decision in this case conflicts with a number of these decisions. As such, certiorari should be granted. (Rule 10(b), Supreme Court Rules.)

A. Constitutional Foundations: This Court has declared that an individual has the "right to remain silent" in all interactions with the police.

In *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), this Court said plainly and with great clarity:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement – *the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.*

(emphasis added.)

This Court has held that the invocation of the privilege against self-incrimination must be given a "liberal construction." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 487. The invocation of the privilege against self-incrimination does not require any special combination of words. *Quinn v. United States*, 349 U.S. 155, 162 (1955). The privilege against self-incrimination can be asserted in any investigatory or adjudicatory proceeding, *Kastigar v. United States*, 406 U.S. 441, 444 (1972), and "*at the time of arrest and* during custodial

interrogation, innocent and guilty alike – perhaps particularly the innocent – may find the situation so intimidating that they may choose to stand mute." *United States v. Hale*, 422 U.S. 171, 177 (1975) (emphasis added).

This Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966), two years after *Malloy* and added a protective or "prophylactic" rule that the police must, when things proceed to the level of "police custodial interrogation," inform the suspect of that right and several appurtenant rights, such as the right to have counsel present during questioning. The *Miranda* decision, however, in no way conditioned the existence of "the right of a person to remain silent" on the timing or actual giving of the warnings.[6]

This Court's precedents establish that this "right to remain silent" in the face of police questioning applies with equal force at every stage and in every setting of interaction between individuals and the police:

> *Consensual encounter*: *"The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way* (citations omitted)." *Florida v. Royer*,

---

[6] "The furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution." *Jenkins, supra*, 447 U.S. at 247 n.17 (Marshall, J., dissenting).

460 U.S. 491, 497-98 (1983) (emphasis added);

Detention: "[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.*" *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (emphasis added)[7];

Custodial interrogation: "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.*" *Miranda v. Arizona*, 384 U.S. at 468 n.37 (emphasis added).

These cases under both the Fourth and Fifth Amendments, applied to the states under the Fourteenth, make clear that it makes no analytical

---

[7] See also *Hiibel v. Sixth Judicial District Court Of Nevada, Humboldt County*, 542 U.S. 177 (2004), in which an officer, under a Nevada statute, attempted to obtain the identity of the person detained, which is not what Officer Bambrick was doing in this case. In *Hiibel*, the Court distinguished between seeking a name, which it found "to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances," *id.* at 191, and any other information which would have the potential to be significantly more incriminating. For example, in the present case, if Raff had even acknowledged knowing Bowen, it could have been highly incriminating.

difference if Petitioner was "in custody" for *Miranda* purposes or actually received his "*Miranda* rights" since his "right to remain silent" is not dependent on when – or if – a police officer chooses to advise him of that right. At every step along the continuum of police-individual contacts, this Court has flatly stated that the individual is under no obligation to respond to police questions other than in the "unfettered" exercise of his will, and shall suffer no adverse consequences for exercising that right.

Even a 19-year-old like Joshua Raff must be presumed to have seen at least a few episodes of "*Law & Order*", and thus have reason to believe and rely upon the common knowledge that he had a "right to remain silent" under precisely the circumstance he found himself in. Such a reasonable understanding of reality was confirmed by this Court when Chief Justice Rehnquist wrote in *Dickerson v. United States*, 530 U.S. 428, 443 (2000), that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."

There is, however, another line of *impeachment* cases since *Miranda* that, as will be seen below, has caused a blurring of this analysis in some courts. In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), the Court held that post-*Miranda* silence could not be used to impeach a testifying defendant:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence

> will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Thereafter in *Jenkins*, *supra*, the Court found no constitutional impediment to impeachment with pre-arrest, pre-*Miranda* silence because there was no implicit assurance for someone to rely upon since warnings had not been given. Similarly, in *Fletcher v. Weir*, 455 U.S. 603, 607 (1982), the Court found no constitutional impediment to impeachment with post-arrest, pre-*Miranda* silence:

> In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

These latter cases dealt with defendants who chose to take the stand at their trials and waive their Fifth Amendment right not to testify. At that point, their previous silence was offered to impeach the credibility of the testimony they chose to give. In the present case, Raff did not testify, and the "evidence of silence" was affirmatively offered as substantive

evidence of guilt. Justice Stevens dissented from the *Doyle* decision, but pointed out that "as long ago as *Raffel v. United States*, 271 U.S. 494 [(1926)], this Court recognized the distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes" (426 U.S. at 628 (Stevens, J., dissenting)), the former being a far more serious matter than the latter. In *United States v. Hale*, *supra*, 422 U.S. 171, 177 for instance, the Court was in no doubt that "in most circumstances silence is so ambiguous that it is of little probative force."

It thus appears from this Court's decisions that allowing use of a testifying defendant's silence for impeachment purposes is an exception to the rule that silence in the face of official questioning cannot be affirmatively used. It is founded on the concept that the defendant has waived his Fifth Amendment right not to testify, so absent *Miranda* warnings earlier silence, just as earlier statements, can be challenged for credibility. Unfortunately, the lower courts, lacking guidance from this Court, have confused the exception with the rule.

B. The Conflicts Among the Circuits and the State Courts: There are at least three conflicting approaches to the use of silence as affirmative evidence of guilt. This has caused unequal and disparate treatment of defendants throughout the nation.

The Sixth Circuit faced the question of whether prearrest silence could be used as affirmative

evidence of a non-testifying defendant's guilt in *Combs v. Coyle*, 205 F.3d 269, 281 (6th Cir. 2000). The court in that case considered the question at length, noting that the Circuits were divided on the issue and further noting that this Court's decision in *Jenkins* did not resolve the question, "namely, whether the use of prearrest silence as substantive evidence of guilt violates the Fifth Amendment." *Id.* The court saw the obvious distinction between use of silence for impeachment purposes and use of it as substantive evidence of guilt. "That use of a defendant's prearrest silence as substantive evidence of guilt is significantly different than the use of prearrest silence to impeach a defendant's credibility on the stand is clear." *Id.* The court noted that the question had equally divided the Circuits:

> Three circuits have held that such use violates the privilege against self-incrimination found in the Fifth Amendment, relying principally upon *Griffin* [*v. California*, 380 U.S. at] 609 [(1965)]. *See United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir.), *cert. denied*, 493 U.S. 969 (1989); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992).
>
> * * *
>
> Three circuits, on the other hand, have reached the opposite conclusion. *See United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *United States v. Zanabria*, 74 F.3d

> 590, 593 (5th Cir. 1996); and *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998).

Combs, 205 F.3d at 282.

The *Combs* court broke the tie and ruled that the affirmative use of prearrest silence violates the Fifth Amendment and does not depend on when, or if, the officer decides to advise a person being questioned of his right to remain silent:

> We agree with the reasoning expressed in the opinions of the Seventh, First, and Tenth Circuits, and today we join those circuits in holding that the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination. Like those circuits, we believe "that application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime." *Coppola*, 878 F.2d at 1565. The Supreme Court has given the privilege against self-incrimination a broad scope, explaining that "[i]t can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." [Citations omitted.] In a prearrest setting as well as in a post-arrest setting, it is clear that

> a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the privilege should thus apply.

205 F.3d at 283.

Other Circuits have been as troubled by the split in authority. For instance, the Fifth Circuit noted the three-way split in its opinion in *United States v. Pando Franco*, 503 F.3d 389, 396 n.1 (2007):

> The issue has also split the circuit courts. The Ninth, Tenth, and D.C. Circuits hold that the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-30 (9th Cir.2001) (*en banc*); *United States v. Whitehead*, 200 F.3d 634, 637-39 (9th Cir.2000); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir.1991); *United States v. Moore*, 104 F.3d 377, 384-90 (D.C.Cir.1997). The First, Sixth, and Seventh Circuits go even further and hold that the use of pre-arrest silence as substantive evidence of guilt is impermissible under the Fifth Amendment. *See Coppola v. Powell*, 878 F.2d 1562, 1567-68 (1st Cir.1989); *Combs v. Coyle*, 205 F.3d 269, 280-83 (6th Cir.2000); *Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir.1987). Finally, the Fourth, Eighth, and Eleventh Circuits hold that the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt does not violate the Fifth Amendment privilege against

> self-incrimination. *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir.1985); *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir.2005); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir.1991).

The *Pando Franco* court avoided resolving the issue. Other Circuits have also noted the split. *See, e.g., United States v. Green*, 541 F.3d 176, 188 n.12 (1st Cir. 2008) (calling the question "somewhat thorny").

The Eleventh Circuit's decision in *Rivera* provides a perfect example of how both *Jenkins* and *Fletcher v. Weir*, *supra*, which concerned solely the question of impeaching a testifying defendant with prior silence, have been misconstrued to indicate that the government can use silence as affirmative evidence of guilt and comment upon it to the jury. In *Rivera*, the Circuit faced the use of a non-testifying defendant's silence during a Custom's examination both prior to and after arrest. The Circuit expressed its conclusions in this fashion:

> The government may comment on a defendant's silence if it occurred prior to the time he was arrested and given his *Miranda* warnings. [Citing *Jenkins* as sole authority for this statement.] . . . In addition, the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given. [Citing *Fletcher v. Weir*, *supra*, as sole authority for this statement.]

Rivera, 944 F.2d at 1568 (footnotes citing the cases omitted).

While most state courts have precluded the affirmative use of a defendant's prearrest silence either on state law grounds or pursuant to the constitutional privilege against self-incrimination, there is a split in these courts as well. Maryland's highest court surveyed the decisions of the Federal Circuits and other states and found that a majority of jurisdictions had concluded that prearrest evidence of silence is inadmissible. *Weitzel v. State*, 863 A.2d 999, 1003 n.3 (Md. 2004). In its survey of state court decisions, the *Weitzel* court found the split to be profound, though tilting toward inadmissibility:

> State courts are also split on the issue, with some courts holding that pre-arrest, pre-*Miranda* silence is not admissible as substantive evidence of guilt. *See People v. Welsh,* 80 P.3d 296 (Colo.2003); *People v. Rogers,* 68 P.3d 486, 492 (Colo.Ct.App.2002); *Landers v. State,* 270 Ga. 189, 508 S.E.2d 637, 638 (1998); *State v. Moore,* 131 Idaho 814, 965 P.2d 174, 180 (1998); *State v. Dunkel,* 466 N.W.2d 425, 428-29 (Minn.Ct.App.1991); *State v. Rowland,* 234 Neb. 846, 452 N.W.2d 758, 763 (1990); *People v. DeGeorge,* 73 N.Y.2d 614, 543 N.Y.S.2d 11, 541 N.E.2d 11, 13 (N.Y.1989); *State v. Leach,* 102 Ohio St.3d 135, 807 N.E.2d 335, 342 (2004); *Hartigan v. Commonwealth,* 31 Va.App. 243, 522 S.E.2d 406, 410 (1999), *aff'd en banc* 32 Va.App. 873, 531 S.E.2d 63

> (2000); *State v. Easter,* 130 Wash.2d 228, 922 P.2d 1285, 1292 (1996); *State v. Fencl,* 109 Wis.2d 224, 325 N.W.2d 703 (1982); *Tortolito v. State,* 901 P.2d 387, 390 (Wyo.1995).
>
> Other [State] courts hold that pre-arrest, pre-*Miranda* silence does not implicate the Fifth Amendment. *State v. Leecan,* 198 Conn. 517, 504 A.2d 480, 484 (1986); *State v. Kinder,* 942 S.W.2d 313, 326 (Mo.1996); *State v. Helgeson,* 303 N.W.2d 342, 348 (N.D.1981).

Id.[8] The *Weitzel* court "join[ed] the increasing number of jurisdictions" and held that such evidence "is too ambiguous to be probative when the 'pre-arrest silence' is in the presence of a police officer." 863 A.2d at 1002.

C. The Need For a Clear Decision From This Court is Plain.

As set forth above, the lower federal courts and courts of a number of states have been dealing with a lack of clear precedent from this Court since the 1980 *Jenkins* decision, and the result is confusion, complexity and conflict. *Doyle*, *Jenkins* and *Weir* make clear how *silence for impeachment* purposes is analyzed, but the use of *silence as affirmative,*

---

[8] Other courts have found the split in authority troubling, as well. *See, e.g., Hennessy v. State*, 268 S.W.3d 153, 158-61 (Tex. App. Waco, 2008) (citing the conflicting decisions and the conflicting commentary that those decisions have spawned).

substantive evidence of guilt remains unnecessarily muddied.

A plurality of the courts that have weighed in on this issue have suggested that *Griffin v. California,* 380 U.S. 609 (1965), provides a model for decision in this case. This Court in *Griffin* granted certiorari "to consider whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth in *Malloy v. Hogan*. . . ." *Id.* at 611. The Court decided that it did:

> [C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

Id. at 614 (citations and footnote omitted). The Court held:

> [T]hat the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

Id. at 615 (footnote omitted).

Though the decision concerned silence during trial, the language of the *Griffin* holding indicates no

such limitation. Petitioner respectfully suggests that the import of *Griffin* is that the prosecution is forbidden from eliciting any testimony in their case-in-chief or making any comment to the jury on the "accused's silence" in the face of official questioning as affirmative evidence of guilt whether the "right to remain silent" was exercised inside or outside of the courtroom, before or after *Miranda* warnings are given. That is the meaning of the "right to remain silent" that this Court applied to the states in *Malloy*: "*[T]he right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.*" *Malloy*, 378 U.S. at 8.

If that rule does not apply to someone in Petitioner's circumstances, to whom would it apply?

CONCLUSION

Someone in Joshua Raff's position might not fully understand the criminal justice system or the Constitution, but he would certainly remember the ubiquitous phrase "you have the right to remain silent; anything you say can and will be used against you in a court of law." So, when asked potentially incriminating questions by a police officer, he remained silent only later to be told that it wasn't true and that beyond any words he might have uttered, his silence would also be used against him in a court of law.

Such a rule unfairly burdens a defendant's right not to testify by shifting the burden of proof onto the accused to prove his or her innocence – to answer the question why he remained silent – returning us to the "'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Griffin*, *supra*, at 614.

If silence contemporaneous with arrest can constitutionally be introduced and used to argue that one is guilty of substantive offenses, then everyone who finds themselves in Raff's position is in the untenable position between Scylla and Charybdis where either their words *or* their silence will, in fact, be used against them at trial. They will be damned by their words or damned by their silence. Simply stated, they actually don't have a "right to remain silent" because if they don't come up with a good explanation, it will be argued that their silence is tantamount to a confession.

Only a ruling from this Honorable Court clarifying this conundrum can resolve the fundamental issue presented by this case: Does the "right to remain silent" really mean that when a police officer asks a citizen potentially incriminating questions, that person can remain silent and "*suffer no penalty . . . for such silence*"?

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID V. KIRBY
BARBARA E. O'CONNOR
O'CONNOR & KIRBY, P.C.
174 Battery Street, 3rd Floor
Burlington, VT 05401
(802) 863-0112
David@KirbyOConnor.com

JOSHUA C. NEEDLE
Counsel of Record
JOSHUA C. NEEDLE, ESQ.
171 Pier Avenue, No. 192
Santa Monica, CA 90405
(310) 428-1092
jcneedle@vzavenue.net

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA ELI RAFF, Defendant and Appellant.	B205719 (Los Angeles County Super. Ct. No. SA 060350) (Filed Jul. 15, 2009)

APPEAL from a judgment of the Superior Court of Los Angeles County; Katherine Mader, Judge. Affirmed and remanded with instructions.

Joshua C. Needle for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary

Sanchez and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joshua Eli Raff of three counts of second degree robbery, and found true the special allegations that Raff had personally used a handgun in two of the robberies. Raff appeals, arguing that the trial court committed numerous errors, that there was insufficient evidence, and that his trial counsel provided ineffective assistance. We disagree and affirm his conviction. We amend the abstract of judgment to reflect the proper sentence.

BACKGROUND

An information filed September 21, 2006 charged Raff with three counts of second degree robbery in violation of Penal Code section 211, and one count of receiving stolen property in violation of Penal Code section 496, subdivision (a). The information also charged that Raff used a handgun in two of the robberies, in violation of Penal Code section 12022.53, subdivision (b). Raff's codefendant, Casey Bowen, was charged with second degree robbery in one of the counts charging Raff. Bowen was also charged with two other counts of second degree robbery, one count of receiving stolen property, and one count of forgery. The information charged that Bowen used a handgun in each of the three counts of second degree robbery.

Raff pled not guilty and denied the special allegation. Bowen initially pled not guilty, but during jury selection he withdrew his not guilty plea, pled no

contest to two counts of robbery, and admitted the use of a handgun during those robberies.

At trial, the prosecution presented evidence of a string of robberies.

May 18, 2006 Gomez robbery (Count 1). At 12:50 a.m. on May 18, 2006, Refugio Gomez was walking home from work on Ashland Street in Los Angeles County. He saw a man wearing a grey hooded sweatshirt walking toward him, who put his hands inside the sweatshirt as he drew nearer. The man pulled out a black semiautomatic gun, put the gun to Gomez's head, and said, "Give me your fucking money." The man also asked for Gomez's car keys (Gomez did not have a car), threatened to kill Gomez, and after Gomez gave him his wallet, told Gomez to take off his socks, belt, and pants, to see whether he had more money. The man began to walk away, still pointing the gun. When Gomez asked for his identification card back, the man took Gomez's money ($62-$67) out of the wallet and threw the wallet on the ground. When Gomez retrieved it, the man was gone.[1] The entire robbery took 10-12 minutes.

Gomez said the robber was possibly Hispanic and identified, as the weapon used in the robbery, a semiautomatic handgun which earlier testimony

---

[1] No fingerprints were found on Gomez's wallet.

established had been stolen from a neighbor of Bowen's.[2]

A few days after the robbery, police officers showed Gomez two photographic lineups, one containing a photo of Raff and one containing a photo of Bowen. Gomez identified Raff as the robber. Gomez also identified Raff as the robber at a preliminary hearing. At trial, the prosecution brought Bowen into the courtroom and Gomez stated that Bowen did not look like the robber. Gomez identified Raff, both while seated next to counsel and while standing near Gomez, as the robber.

May 21, 2006 Tifford Robbery (Count 5). At 1:30 a.m. on May 21, 2006, Paul Tifford was near Fuller Avenue and Franklin Avenue in Los Angeles County, walking to his car after visiting a friend. As he opened the car door, he heard running behind him, and turned around to see a man pulling out a gun from a grey hooded sweatshirt. Tifford identified Raff as the person who approached him. The man held the gun to Tifford's head and said, "If you do everything that I tell you, you won't get hurt." Pushing Tifford to the back of his car, the man said, "Give me your wallet." Tifford handed over his wallet, asking the man several times not to hurt him. Inside Tifford's

---

[2] One of Bowen's neighbors, Keshanna Spencer, testified that she returned to her apartment in August 2005 to find it burglarized. Among the stolen items was a Taurus .45 semi-automatic handgun. After the burglary, Spencer saw Bowen lingering around her apartment.

wallet were three credit cards, an ATM card, a health card, a gift card, Tifford's Social Security card, and money.

The man then pointed the gun in a different direction and said, "This is what you're going to do. . . . Run nigger." Tifford ran to the next street over, and told two people he had been robbed. They let him ride in a taxi with them back to his friend's apartment, where Tifford called the police.

A day or two later, Tifford circled a photograph of Raff in a police "six-pack" as most closely resembling the man who robbed him. Tifford also identified Raff at a preliminary hearing where Bowen also was present. At trial, Bowen was brought into the courtroom, and Tifford stated that the two men did not look at all similar, and that Raff was the man who robbed him of his wallet.

May 21, 2006 Silverman Robbery (Count 2). At 8:30 p.m. later that same day, May 21, 2006, Michael Silverman was walking home on 16th Street from a supermarket in Santa Monica. A man wearing a white hooded sweatshirt with the hood up and a dark bandanna covering his nose and mouth approached from Silverman's right side, put a gun to Silverman's head, and said, "Mother fucker, give me your wallet or your money. And don't think I won't shoot you. You know, don't play with me, mother fucker." Silverman threw his wallet on the ground. The robber said, "Do you think I'm fucking with you . . . mother fucker?" Silverman said no. The robber

picked up the wallet and headed off in one direction, while Silverman began to walk in another. The robber then said, "If you're lucky, you may be able to find your wallet down the road." Silverman began to follow, thought better of it, and headed off toward home. Inside his wallet were Silverman's license, a bank debit card, and two dollars. Silverman called the police on the spot. He was unable to find his wallet.

Silverman identified the gun stolen from Bowen's neighbor as somewhat like the gun used in the robbery. He identified his signature on a six-pack of police photos, describing Bowen's photo as "looks similar to the man who robbed me." Silverman had also identified Bowen as the robber at the preliminary hearing. He stated that Raff was not the robber: "I never saw that man." When Bowen was brought into the courtroom, Silverman stated that this was the man who robbed him "as best as I can recall."

Los Angeles Police Officer David Bambrick testified that he was a passenger with his partner in a patrol car in Venice at 9:45 p.m. on May 21, 2006, about an hour after the Silverman robbery. A silver Kia Optima passed the patrol car with Raff in the passenger seat. Officer Bambrick noticed that neither the driver nor the passenger was wearing a seatbelt, and the patrol car made a U-turn to follow the Optima. The Optima immediately sped up to 50 miles per hour, with the patrol car following. Officer Bambrick saw Raff lean toward the open window on

the passenger side of the Optima as it neared the corner on 7th Avenue. The Optima raced through a red light and the officers continued their pursuit. The Optima eventually slowed down and pulled over, and the officers turned on their red lights to conduct a traffic stop.

The driver began to exit the car and Bambrick's partner told him to get back in. Bambrick identified Bowen, who had been brought into the courtroom, as the driver. Bambrick's partner asked Bowen for his driver's license, and then ordered him out of the car. A search recovered Silverman's license from Bowen's left pants pocket. Bowen was placed in the patrol car.

Officer Bambrick was standing near the Optima's front passenger door, and noticed that Raff was nervous, looking to his left and right and over his shoulder. Bambrick shined his flashlight on Raff and told him to place his hands on his knees or on the dashboard. Officer Bambrick then ordered Raff out of the car and asked him, "Hey. What's going on? You know, what's up with the driving?" Raff stared straight ahead and did not answer. Bambrick handcuffed him and placed him in the patrol car with Bowen.

Ten minutes later, Officer Bambrick returned to the street location where he had seen Raff lean toward the open passenger window of the Optima. He found a .45 caliber semiautomatic handgun on the sidewalk and a magazine nearby. Inside the car, Bambrick found a bandanna. A black leather wallet

was on the driver's seat of the car, containing Tifford's Social Security card and health insurance card. No fingerprints were found on the gun or the magazine. The gun was the semiautomatic in evidence at trial and was identified by the robbery victims as the weapon used.

Santa Monica Police Officer Michael Bambrick[3] and another officer searched the Optima after it was in custody. He found two cell phones in the passenger compartment. One of the phones was Raff's, with his voice on the voicemail message using Spanish words. A text message on Raff's phone sent at 8:44 p.m. just after the Silverman robbery said, "Just a debit card, like, three. That's all they got. Pinche putos."[4] The other phone was Bowen's.

Officer Michael Bambrick also found in the car's glove compartment a May 16 Enterprise rental agreement for the Optima, and a handwritten note. The note contained driving directions leading to a location close to where the Tifford robbery took place. There was a black hooded sweatshirt in the back seat as well as two bags of fast food. A white hooded sweatshirt was in the trunk, with bags of groceries and a Louis Vuitton suitcase. A grey hooded sweatshirt was

---

[3] Officer Michael Bambrick is the brother of Los Angeles Police Officer David Bambrick, who also testified for the prosecution.

[4] An interpreter testified that "pinche putos" means "fucking ass hole," "fucking mother fucker," or "fucking fag."

recovered as well, and a police photograph showed Bowen wearing a grey hooded sweatshirt.

Raff's mother testified for the defense that Raff was in their home in Santa Monica all night the evening of May 17 and the early morning of May 18, 2006, according to a notebook she kept at the time. She met Bowen when Raff brought him home in the evening of May 21. Raff and Bowen left shortly thereafter.

In closing argument, the prosecution argued that Raff committed the Gomez and Tifford robberies using the gun, and that Bowen committed the Silverman robbery with Raff aiding and abetting, emphasizing the eyewitness identifications by the victims. The defense argued that Bowen committed all the robberies, and that the eyewitness identifications of Raff were inaccurate and unreliable.

The jury convicted Raff of count 1 (the Gomez robbery), count 2 (the Silverman robbery), and count 5 (the Tifford robbery). The trial court sentenced Raff to the low term of two years on count 1, with a ten-year enhancement for the use of the gun. On count 2, the court imposed a concurrent two-year term for the robbery. As to count 5, Raff received the low term of two years for the robbery with a ten-year enhancement for the gun use, to run concurrently with the sentence on count 1. Raff was ordered to pay restitution and parole revocation fines, and received 714 days of custody credit.

DISCUSSION

I. The trial court did not abuse its discretion in declining to take judicial notice of Bowen's plea of no contest to the Gladstone/Brotman robbery.

After jury selection began, Raff's codefendant Bowen pled no contest to two counts of robbery and the use of a handgun in connection with those robberies. Bowen pled no contest to count 2, the Silverman robbery, and count 6, which alleged that on May 18, 2006, Bowen had robbed Howard Gladstone and Carol Brotman. The Gladstone/Brotman robbery took place about 20-30 minutes after the Gomez robbery, a short distance away. Raff was not charged with the Gladstone/Brotman robbery.

In his opening statement, Raff's counsel argued that Bowen had committed the Gladstone/Brotman robbery and that Bowen, not Raff, had just a short time earlier committed the Gomez robbery nearby. After the opening statement was complete, the prosecution objected to the reference to the Gladstone/Brotman robbery, because the victims were out of the country. Raff's counsel requested that the court take judicial notice that Bowen had pled no contest to the robbery.[5] The court concluded that Bowen's plea to the Gladstone/Brotman robbery had little to do with

---

[5] Bowen had also pled no contest to the Silverman robbery, and Raff's counsel argued that the court should take notice of Bowen's plea to both crimes.

whether Raff committed the Gomez robbery a half hour or so earlier. The evidence showed that Raff and Bowen were working together, that Raff was in the car with Bowen when the gun was dropped out of the window, and "I don't see the probative value and, beyond that, the confusion as to when somebody pleads no contest to something whether or not they're pleading really guilty." The court decided to stay with the instruction that the jurors were not to speculate why Bowen was not a part of the case, and denied the request to take judicial notice.

Raff argues that the court's decision not to take judicial notice of Bowen's plea was an abuse of discretion, preventing Raff from presenting his theory of "third party culpability," i.e., that Bowen alone committed all the robberies with which Raff was charged.[6] When the trial court decides to exclude evidence under Evidence Code section 352 because its probative value is substantially outweighed by the probability that its admission will unduly consume time, confuse the issues, or mislead the jury, we will not disturb that ruling absent "a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

---

[6] Raff's appellate counsel, substituted in after Raff's conviction, also argued this issue in a new trial motion which the trial court denied.

Bowen's plea of no contest to the charge that he was responsible for a later robbery nearby had little tendency to disprove Raff's guilt of the Gomez robbery. Bowen's connection to a robbery near in place and time was actually consistent with the prosecution's evidence at trial that Bowen and Raff travelled together. Gomez firmly identified Raff as the man who robbed him, and stated that Bowen did not look like the robber. It cannot reasonably be inferred from Bowen's plea to a different robbery that Bowen alone committed the robbery of Gomez. Further, what little tendency Bowen's plea of no contest to the Gladstone/Brotman robbery had to disprove Raff's guilt of the charged robbery of Gomez was outweighed by the time that would be required to introduce evidence of another robbery with which Raff was not charged, whose victims were unavailable to testify, and whose addition to the string of robberies in issue could cause confusion. The trial court was within its discretion to deny Raff's request to take judicial notice of Bowen's no contest plea.

II. The trial court properly admitted testimony of Raff's silence.

After the traffic stop of the Optima, Bowen was arrested and placed in the patrol car. Officer Bambrick testified that he then ordered Raff out of the car, detained him, and "asked him a couple of questions, like, 'Hey. What's going on? You know, what's up with the driving?'" Over the defense's objections, Officer Bambrick testified that Raff did

not respond. In closing argument, the prosecution argued that Raff's silence was evidence of guilt: "Officer Bambrick then approaches the defendant, says, 'What's going on?' He's looking around nervously. Wouldn't even respond to him. Does that seem like someone who hasn't done anything wrong, didn't know what [was] happening, was innocent to this whole situation? [¶] The officer said, 'Hey. What's going on? What are you guys doing?' Officer Bambrick doesn't know there's a string of robberies going on. [¶] The defendant won't even talk to him. Does that seem like innocent behavior? Absolutely not."

Raff argues that the prosecution's comments on his silence violated his Fifth Amendment right to due process. We disagree. Raff was not under arrest and Officer Bambrick *was not investigating, nor was he even aware of, the robberies for which Raff was standing trial.* There is a split in the federal courts regarding whether the Constitution is violated when the prosecution comments on a defendant's silence occurring before his arrest and before he received *Miranda* warnings, and uses that silence to argue consciousness of guilt. (See *People v. Waldie* (2009) 173 Cal.App.4th 358, 365-366.)

But the cases finding a constitutional violation all involve questioning that occurred during the investigation of the charged offense. Raff cites no authority, nor have we found any, that the government violates the Constitution when it comments on the defendant's silence during noncustodial questioning unrelated to the crime with which the defendant

is charged. Officer Bambrick did not ask Raff about or accuse him of any criminal behavior, and was unaware of the robberies. (See *U.S. v. Oplinger* (9th Cir.1998) 150 F.3d 1061, 1067 [Fifth Amendment does not preclude admission or commentary "'about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference.'"].) The trial court properly admitted the evidence that Raff was silent when questioned after the traffic stop.

III. The trial court did not err in holding an evidentiary hearing regarding jury contamination without Raff present or in failing to grant Raff's motion for mistrial.

During the trial, Juror No. 1 told the court clerk that the "mother of one of the defendants tried to talk to them in the hallway." Raff's counsel said it was Bowen's mother. The court called Juror No. 1 to a sidebar. The juror explained that while several jurors were eating lunch, a woman from another table spoke to them, saying she was from out of town. When she said her last name was Bowen, they "immediately walked away and said 'we can't talk to you.' And we left." The juror explained that nothing was said and "we just felt that maybe she should be made aware that she can't speak to us." Juror No. 1 then added "I think I caught her say that – you know, something about just hanging out with the wrong group of people. But at that point we were walking away."

Juror No. 4, who was also at the table, confirmed that Bowen's mother said "something about hanging out with the wrong kind" and started crying. Juror No. 5 remembered only that the woman mentioned that she was from South Carolina and mentioned her last name. Juror No. 12 stated that Bowen's mother said, "'Yeah. It's been tough. He's like, two months away from graduation, and then he got caught up with the wrong people or something.' And so she was just very distraught and stuff. [¶] And then we're, like, we shouldn't be hearing this. So, like, then the four of us just got up and left." All the jurors stated that this encounter did not affect them at all in their evaluation of Raff's guilt or innocence.

Raff's counsel argued that Bowen's mother's statement that her son "just got caught up with the wrong crowd" was prejudicial to Raff and asked the court to declare a mistrial. The court denied the motion for mistrial, stating "the comments were made with respect to Mr. Bowen who is no longer a part of this case. They got up immediately and left. They each say that it will not influence them at all with respect to how they would judge the culpability of Mr. Raff in this affair." The trial court instructed the four jurors not to mention the comments to the other jurors and out of the jury's presence asked Bowen's mother to leave the courtroom.

Raff first argues that under the Sixth and Fourteenth Amendments Raff had a right to be present during the sidebar with the jurors. "'[T]he accused is not entitled to be personally present during

proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him, and the burden is upon him to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial.'" (*People v. Ervin* (2000) 22 Cal.4th 48, 74.) Raff's presence during the sidebar with the jurors would have served little purpose. His trial counsel was present and argued that a mistrial was appropriate. The trial court questioned all four jurors, and all stated that the encounter would have no influence on them. Raff has not shown what his presence would have provided that his counsel's representation and argument did not, and we conclude that he has not carried his burden to show that his absence prejudiced him or denied him a fair trial.

Nor has he shown that the trial court abused its discretion in denying his motion for a mistrial. The trial court conducted an inquiry and established that the facts did not show any jury contamination or misconduct, and Raff does not show that any misconduct occurred or that any prejudice resulted. (See *In re Hamilton* (1999) 20 Cal.4th 273, 294.)

IV. Sufficient evidence supported the jury verdict of guilty on count 2.

Raff argues that the evidence was insufficient to sustain his conviction on count 2, the robbery of Silverman. We ask whether viewing the evidence in the light most favorable to the prosecution, any

rational jury could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We do not reweigh the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The prosecution argued that Raff aided and abetted Bowen in the Silverman robbery, and the court instructed the jury on aiding and abetting. An aider and abettor may be "'"anyone 'concerned,' however slight such concern may be, for the law establishes no degree of the concern required to fix liability as a principal."'" (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743.)

Silverman was robbed in Santa Monica at 8:30 p.m. on May 21, 2006. Minutes later, at 8:44 p.m., a text message sent from Raff's cell phone described the items taken from Silverman.[7] An hour after the text message was sent from Raff's phone, police in Venice stopped Bowen and Raff in the Optima after watching Raff lean toward the open passenger window near the location where the officers later found on the sidewalk the gun used in the Silverman robbery. Subsequently, Silverman identified Bowen as the robber. Aiding and abetting "'may be committed "on the spur of the moment," that is, as

---

[7] The text message was "Just a debit card, like, three. That's all they got. Pinche putos." This is consistent with the contents of Silverman's wallet, which consisted of a debit card and two dollars, in addition to his license.

instantaneously as the criminal act itself,'" and encompasses someone "'who has no prior knowledge of a robbery, but who forms the intent to aid in carrying away the loot.'" (*People v. Swanson-Birabent, supra,* 114 Cal.App.4th at p. 742.) The text message from Raff's cell phone immediately after the robbery describing the wallet contents, and Raff's behavior in the car Bowen drove after the robbery, constituted sufficient evidence that Raff was involved in some way in the Silverman robbery described in count 2.

V. Raff's trial counsel did not provide ineffective assistance.

Raff has the burden to prove that his trial counsel was ineffective, which requires that he show the lawyer's performance "fell below an objective standard of reasonableness" "under prevailing professional norms," and that the errors prejudiced him because but for the errors, there was a reasonable probability that the jury would have had a reasonable doubt as to Raff's guilt. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *In re Cordero* (1988) 46 Cal.3d 161, 180.) Raff presented this argument in his motion for a new trial.

Raff argues that his trial counsel was ineffective because he failed to "investigate and challenge the eyewitness identifications in this case." To the contrary, trial counsel spent a great deal of time challenging the eyewitness identifications, cross-examining the eyewitnesses and arguing to the jury

that the eyewitness identifications were wrong. The court instructed the jury on how to evaluate the testimony of eyewitnesses.

Raff also argues that it was ineffective assistance not to present expert testimony on eyewitness identification. While *exclusion* of such testimony may be an abuse of discretion "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability" (*People v. McDonald* (1984) 37 Cal.3d 351, 377), Raff's case involved substantial corroborating evidence of his involvement in the robberies (for example, his presence in the car from which the gun was thrown, the other evidence found in the car, and the text message on his phone immediately after the Silverman robbery). It was not below an objective standard of reasonableness not to present expert testimony on eyewitness identification.

Raff's other claims of ineffective assistance are similarly without merit. Raff has not shown that trial counsel's decision not to seek a continuance after Bowen's plea was not a reasonable tactical decision. The failure to introduce a handwriting expert to determine who wrote the directions found in the Optima was not ineffective assistance, because it was of little importance whether Raff or someone else wrote the directions; the importance of the directions was that they led to a location near one of the robberies. And finally, Raff has not shown how better preparation of his mother would have made her

testimony more helpful to the defense. All these additional claimed errors were within counsel's latitude to make tactical decisions regarding the conduct of the defense.

VI. We correct the trial court's statement of Raff's sentence.

The trial court described Raff's sentence on count 1 as follows: "The Court selects the low term of 12 years due to the lack of record of the defendant, plus the additional term of ten years pursuant to Penal Code section 12022.53, sub[division] (b)."

The minute order and the abstract of judgment describe Raff's sentence as 12 years as to the substantive offense with a 10-year enhancement pursuant to section 12022.53 on count 1, ordered to run concurrently with the 12-year sentence.

Two years is the low term for second degree robbery in violation of Penal Code section 211. (Pen. Code, § 213.) The 10-year enhancement under section 12022.53 subdivision (b) must be imposed consecutively (any person who commits robbery and "personally uses a firearm, *shall* be punished by an additional *and consecutive* term of imprisonment in the state prison for 10 years" [italics added]).

We therefore correct Raff's sentence to reflect a sentence in count 1 of two years plus an additional 10 years pursuant to the enhancement under section 12022.53, subdivision (b). We also correct the

sentence to impose the required $20 security fee as to each conviction. (Pen.. Code, § 1465.8, subd. (a)(1); *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865.)

DISPOSITION

Because we find no error, there was no cumulative error. We order the sentence modified as follows: The sentence on count 1 is a two-year low term sentence for a violation of Penal Code section 211, plus 10 consecutive years under section 12022.53. Raff is to pay a $20 security fee for each of his three convictions under section 1465.8, subdivision (a)(1). The trial court is directed to prepare an amended abstract of judgment and to forward it to the appropriate prison authorities. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

FERNS, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Court of Appeal, Second Appellate District,
Division One – No. B205719

S175626

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOSHUA ELI RAFF, Defendant and Appellant.

(Filed Oct. 22, 2009)

The petition for review is denied.

Kennard and Chin, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

DEPARTMENT LX "D" — HON. KATHERINE MADER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. JOSHUA RAFF, DEFENDANT.	NO. SA060350

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 5, 2007

APPEARANCES:

FOR THE PEOPLE: STEVE COOLEY, DISTRICT ATTORNEY
BY: KEVIN HALLIGAN, DEPUTY
11701 SOUTH LA CIENEGA BOULEVARD
LOS ANGELES, CALIFORNIA 90045

FOR THE DEFENDANT: LAW OFFICE OF RONALD WHITE
BY: RONALD WHITE

VOLUME 2
PAGES 127 THROUGH 283, INCLUSIVE

REPORTED BY: TRACI THOMAS, CSR #9620
OFFICIAL REPORTER

MASTER INDEX
CHRONOLOGICAL INDEX OF WITNESSES

PEOPLE'S WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
SILVERMAN, MICHAEL				
(RESUMED)	143			
		150		
			151	
FUNO, LESLIE	153			
		156		
			158	
				159
BAMBRICK, DAVID	161			
		182		
			190	
VASQUEZ, CYNTHIA	191			
		196		
BAMBRICK, MICHAEL	219			
		244		
			251	
(RESUMED)			261	
				265
LONGO, CLAUDIA	254			

DEFENDANT'S WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
(NONE)				

* * *

[171] A YES.

Q AND AT THAT POINT IN TIME DID YOU GO THEN AND APPROACH MR. RAFF, THE PASSENGER?

A I WAS STANDING NEXT TO MR. RAFF.

Q OKAY. HOW WAS MR. BOWEN ACTING WHEN YOU APPROACHED THE VEHICLE?

A VERY NERVOUS, EXCITED.

Q HOW WAS MR. RAFF ACTING WHEN YOU APPROACHED THE VEHICLE AS WELL?

A SIMILAR, BUT NOT AS – MR. BOWEN WAS REALLY EXCITED. MR. RAFF APPEARED NERVOUS TO ME, KEPT LOOKING TO HIS LEFT AND HIS RIGHT, LOOKING BACK OVER HIS SHOULDER.

Q AND AT SOME POINT IN TIME DID YOU THEN APPROACH THE PASSENGER SIDE OF THE VEHICLE?

A WHEN MY PARTNER, OFFICER LILO MIAIVA, WAS TALKING TO MR. BOWEN, I WAS STANDING NEXT TO THE PASSENGER DOOR NEXT TO MR. RAFF SITTING THERE THE ENTIRE TIME. SO WE WERE A FEW FEET AWAY FROM EACH OTHER.

Q WHAT WAS THE DEFENDANT DOING WHEN YOU WERE STANDING THERE?

A WHICH ONE?

Q MR. RAFF.

A MR. RAFF. AS I WAS WALKING UP TO THE CAR, HE KEPT – HE WAS LOOKING TO HIS LEFT, HIS RIGHT, HIS LEFT.

ONCE I WALKED UP TO HIM AND ILLUMINATED HIM WITH MY FLASHLIGHT, I TOLD HIM TO PLACE HIS HANDS – EITHER I TOLD HIM TO PUT THEM ON HIS KNEES OR ON THE [172] DASHBOARD IN FRONT OF HIM. AND AT THAT POINT HE JUST STAYED IN THAT POSITION.

Q WHAT, IF ANYTHING, DID YOU SAY OR WHAT HAPPENED NEXT AFTER YOU TOLD HIM TO STAY IN THAT POSITION?

A OFFICER LILO MIAIVA WAS TALKING TO MR. BOWEN. HE WENT THROUGH THAT PAT-DOWN SEARCH, RECOVERED THE I.D., PUT HANDCUFFS ON MR. BOWEN, WALKED HIM BACK AND PUT HIM IN THE DRIVER'S SIDE, REAR DRIVER'S SIDE OF THE POLICE VEHICLE.

I GOT MR. RAFF OUT OF THE CAR AND DETAINED HIM.

Q DID YOU EVER SAY ANYTHING TO MR. RAFF?

A I ASKED HIM A COUPLE OF QUESTIONS, LIKE, "HEY. WHAT'S GOING ON? YOU KNOW, WHAT'S UP WITH THE DRIVING?"

Q AND WHAT, IF ANYTHING, DID HE SAY?

MR. WHITE: OBJECTION.

THE COURT: THIS IS MR. RAFF. OVERRULED.

MR. WHITE: MAY WE APPROACH?

THE COURT: OKAY.

(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR:)

MR. WHITE: YOUR HONOR –

THE COURT: WE'RE AT SIDEBAR.

WHAT DID HE SAY?

MR. HALLIGAN: APPARENTLY HE WON'T TALK TO HIM. HE [173] SAYS, "WHAT'S GOING ON? WHAT ARE YOU DOING?" AND HE JUST WOULDN'T TALK TO HIM, WOULDN'T EVEN LOOK AT HIM.

MR. WHITE: THEN I'M WONDERING WHAT'S THE –

THERE'S NO MIRANDA. HE'S IN CUSTODY. HE'S DETAINED.

THE COURT: THERE'S NO EVIDENCE THAT HE'S IN CUSTODY, AND THERE'S NO EVIDENCE OF AN INTERROGATION.

MR. WHITE: HE'S ALREADY SAYING THAT HE'S THERE, YOUR HONOR, WITH HIS

HANDS THERE AND TELLING HIM, "DON'T MOVE YOUR HANDS." HOW IS THAT NOT A DETENTION?

THE COURT: WELL, IT HASN'T BEEN ESTABLISHED THAT IT'S A DETENTION. YOU CAN, I'M SURE, ASK SOME ADDITIONAL QUESTIONS. BUT IT'S CERTAINLY NOT INTERROGATION. THESE ARE QUESTIONS THAT ARE NOT DESIGNED TO ELICIT AN INCRIMINATING RESPONSE. THEY'RE PRELIMINARY INVESTIGATORY QUESTIONS. THEY'VE GOT THESE TWO PEOPLE THAT ARE NOT WEARING SEAT BELTS THAT ARE DRIVING IN AN ERRATIC WAY.

MR. WHITE: IF HE DOESN'T ANSWER ANY QUESTIONS OR ANYTHING, WHY IS THE QUESTION EVEN BEING ASKED IN FRONT OF THE JURY?

THE COURT: BECAUSE THE FACT THAT HE WON'T GIVE ANY INFORMATION AS TO ANYTHING IN RESPONSE I THINK INDICATES I CONSCIOUSNESS OF GUILT.

MR. WHITE: CONSCIOUSNESS OF GUILT OF WHAT? IF THE OFFICER ASKS HIM, "WHAT'S GOING ON?" AND THIS GUY IS DRIVING LIKE A BAT OUT OF HELL, DRIVING ALONG THE STREET AND HE DOESN'T KNOW WHAT'S GOING ON, HOW IS THAT AN ADMISSION OF GUILT? OF WHAT? THIS ISN'T THE ROBBERY [174] INVESTIGATION.

REMEMBER, YOUR HONOR, THIS IS THE OFFICER WHO IS FOLLOWING THEM BECAUSE THEY DON'T HAVE ANY SEAT BELTS ON. THAT'S SUPPOSEDLY WHAT HAPPENED.

THE COURT: EXACTLY.

MR. WHITE: AND THE DRIVER STARTS DRIVING CRAZY. I'M A PASSENGER IN THE CAR, AND I GET STOPPED. AND THE OFFICER QUESTIONS ME WHAT'S GOING ON, AND I'M A PASSENGER IN THE CAR WHAT –

AN ADMISSION OF GUILT OF WHAT? THAT'S WHAT I –

THE COURT: TO ME, ANY REASONABLE PERSON WHO IS NOT GUILTY OF A CRIME WOULD NOT TRY TO EVADE. WHEN ASKED THAT QUESTION, WOULD SAY SOMETHING LIKE, "I DON'T KNOW. MY FRIEND JUST WENT CRAZY. HE JUST SAW AN OLD GIRLFRIEND HE – HE WANTED TO GET AWAY FROM HER. HE THOUGHT HE WAS BEING CHASED."

I MEAN, THERE ARE A MILLION DIFFERENT THINGS THAT AN INNOCENT PASSENGER WOULD SAY UNDER THESE CIRCUMSTANCES. THE FACT THAT HE DIDN'T SAY ANYTHING, TO ME, IS CONSCIOUSNESS OF GUILTY KNOWLEDGE AS TO SOMETHING, OBJECTS IN THE CAR, THE FACT THAT HE COMMITTED A ROBBERY WITH THIS GUY EARLIER THAT DAY. I DON'T KNOW.

MR. WHITE: EXACTLY. WHAT I'M SAYING IS, THOUGH, HOW CAN YOU SAY THAT IT IS?

THE COURT: I SAY THAT IT IS.

(THE FOLLOWING PROCEEDINGS WERE HELD IN [175] OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: OKAY. MR. HALLIGAN.

MR. HALLIGAN: THANK YOU, YOUR HONOR.

Q OFFICER BAMBRICK, WHEN YOU APPROACHED THE DEFENDANT, WHEN YOU ASKED HIM, "HEY. WHAT'S GOING ON," WHAT, IF ANYTHING, DID THE DEFENDANT SAY OR DO TO YOU?

A HE DIDN'T RESPOND.

Q WHAT EXACTLY DID HE DO WHEN YOU ASKED HIM WHAT'S GOING ON?

A JUST KIND OF STARED STRAIGHT AHEAD.

Q AND AT SOME POINT DID YOU GET HIM OUT OF THE CAR?

A HE WAS OUT OF THE CAR AT THIS POINT WHEN I ASKED HIM THOSE QUESTIONS.

Q AND ONCE YOU GOT HIM OUT OF THE CAR AND HE WOULDN'T RESPOND TO YOUR QUESTION, WHAT DID YOU DO NEXT?

A I JUST HANDCUFFED HIM AND PLACED HIM IN THE BACK SEAT OF THE CAR WITH MR. BOWEN.

* * *

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT LX "D"
HON. KATHERINE MADER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. JOSHUA RAFF, DEFENDANT.	NO. SA060350

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 6, 2007

APPEARANCES:

FOR THE PEOPLE:
STEVE COOLEY, DISTRICT ATTORNEY
BY: KEVIN HALLIGAN, DEPUTY
11701 SOUTH LA CIENEGA BOULEVARD
LOS ANGELES, CALIFORNIA 90045

FOR THE DEFENDANT:
LAW OFFICE OF RONALD WHITE
BY: RONALD WHITE

VOLUME 3
PAGES 284 THROUGH 415, INCLUSIVE

REPORTED BY:
TRACI THOMAS, CSR #9620
OFFICIAL REPORTER

* * *

[354] [Deputy District Attorney Kevin Halligan]

MR. BOWEN IS THE DRIVER. THE DEFENDANT IS A PASSENGER.

AT SOME POINT IN TIME THE POLICE GET MR. BOWEN OUT OF THE CAR. AND WHAT IS IN HIS POCKET? MR. SILVERMAN'S I.D.

OFFICER BAMBRICK THEN APPROACHES THE DEFENDANT, SAYS, "WHAT'S GOING ON?" HE'S LOOKING AROUND NERVOUSLY. WOULDN'T EVEN RESPOND TO HIM. DOES THAT SEEM LIKE SOMEONE WHO HASN'T DONE ANYTHING WRONG, DIDN'T KNOW WHAT HAS HAPPENING, WAS INNOCENT TO THIS WHOLE SITUATION?

THE OFFICER SAID, "HEY. WHAT'S GOING ON? WHAT ARE YOU GUYS DOING?" OFFICER BAMBRICK DOESN'T KNOW THERE'S A STRING OF ROBBERIES GOING ON.

THE DEFENDANT WON'T EVEN TALK TO HIM. DOES THAT SEEM LIKE INNOCENT BEHAVIOR? ABSOLUTELY NOT.

* * *

[374] [Deputy District Attorney]

OF COURSE HE KNOWS WHAT'S GOING ON. HE KNEW WHAT WAS GOING ON WHEN THE DEFENDANT, MR. BOWEN, GOT OUT OF THE CAR. HE KNEW WHAT WAS GOING ON WHEN HE GOT BACK IN THE CAR. HE KNEW WHAT WAS GOING ON WHEN BASICALLY HE CHANGED CLOTHES. HE KNEW WHAT WAS GOING ON WHEN HE TEXT MESSAGES HIS FRIEND ABOUT ROBBING PEOPLE. HE KNEW WHAT WAS GOING ON WHEN HE THREW THAT GUN OUT OF THE CAR. AND HE KNEW WHAT WAS GOING ON WHEN THE POLICE STOPPED HIM AND SAID, "WHAT'S HAPPENING? WHAT'S GOING ON? WHAT ARE YOU GUYS DOING?" AND HE DOESN'T EVEN TALK.

LADIES AND GENTLEMEN, I KNOW I'VE BEEN A LITTLE BIT LENGTHY. I'M GOING TO GO OVER A LITTLE BIT MORE OF WHEN MR. WHITE HAS AN OPPORTUNITY TO SPEAK WITH YOU.

* * *

Supreme Court, U.S.
FILED
MAY 17 2010
OFFICE OF THE CLERK

No. 09-875

In the Supreme Court of the United States

JOSHUA ELI RAFF, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
PAUL M. ROADARMEL, JR.
Supervising Deputy Attorney General
JAIME L. FUSTER
Deputy Attorney General
Counsel of Record
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2354
Fax: (213) 897-6496
DocketingLAAWT@doj.ca.gov
Counsel for Respondent

QUESTIONS PRESENTED

1. Does the State violate a defendant's Fifth Amendment "right to remain silent," as applied to the states by the Due Process Clause of the Fourteenth Amendment, by (1) eliciting testimony from a police officer in its case-in-chief that, prior to arrest, the defendant said nothing in response to the officer's questions about a matter unrelated to the charged crimes, and by (2) arguing to the jury such prearrest silence should be considered as substantive evidence of his guilt?

TABLE OF CONTENTS

Page

Statement of the Case 1

A. Prosecution's case-in-chief 1

1. The robberies 1

2. The arrest 2

3. The investigation 3

B. Defense case 4

C. Factual background and court rulings as to the constitutional issue presented 4

Reasons why the Writ Should be Denied 6

I. There is no split of authority among lower courts as to the crucial legal issue raised by the unique factual scenario herein, and this case does not provide an adequate vehicle for resolving the alleged conflict about the use of a defendant's prearrest silence 8

A. Pertinent law as to the right to remain silent 8

B. The unique circumstances of petitioner's silence set this case apart from those finding a Fifth Amendment violation 12

II. The state court correctly found no constitutional impediment to the use of petitioner's prearrest silence in response to non-accusatory questioning unrelated to the charged offenses 16

TABLE OF CONTENTS
(continued)

Page

III. The legal issue need not be resolved because the opinion below lacks precedential value and the alleged error was harmless.....21

Conclusion.....25

TABLE OF AUTHORITIES

Page

CASES

Berkemer v. McCarty
468 U.S. 420 (1984) 18, 20
Chapman v. California
386 U.S. 18 (1967) 22
Combs v. Coyle
205 F.3d 269 (6th Cir. 2000) 11, 13
Coppola v. Powell
878 F.2d 1562 (1st Cir. 1989) 11, 13
Dickerson v. United States
530 U.S. 428 (2000) 9
Doyle v. Ohio
426 U.S. 610 (1976) ..... passim
Fletcher v. Weir
455 U.S. 603 (1982) 9, 10, 16, 17
Greer v. Miller
483 U.S. 756 (1987) 16
Griffin v. California
380 U.S. 609 (1965) ..... passim
Jenkins v. Anderson
447 U.S. 231 (1980) ..... passim
Landers v. State
508 S.E.2d 637 (Ga. 1998) 12
McNeil v. Wisconsin
501 U.S. 171 (1991) 18, 20, 21
Miranda v. Arizona
384 U.S. 436 (1966) ..... passim
People v. De George
541 N.E.2d 11 (N.Y. 1989) 12

TABLE OF AUTHORITIES
(continued)

Page

People v. Welsh
80 P.3d 246 (Colo. 2003) 11
State v. Dunkel
466 N.W.2d 425 (Minn. App. 1991) 13
State v. Easter
922 P.2d 1285 (Wash. 1996) 11
State v. Fencl
325 N.W.2d 703 (Wis. 1982) 11, 14
State v. Helgeson
303 N.W.2d 342 (N.D. 1981) 11
State v. Kinder
942 S.W.2d 313 (Mo. 1996) 11
State v. Leach
807 N.E.2d 335 (Ohio 2004) 11, 13
State v. Leecan
504 A.2d 480 (Conn. 1986) 11
State v. Rowland
452 N.W.2d 758 (Neb. 1990) 11
Tortolito v. State
901 P.2d 387 (Wyo. 1995) 12
United States ex rel. Savory v. Lane
832 F.2d 1011 (7th Cir. 1987) 11, 13
United States v. Ahmed
472 F.3d 427 (6th Cir. 2006) 14
United States v. Burson
952 F.2d 1196 (10th Cir. 1991) 11, 13
United States v. Love
767 F.2d 1052 (4th Cir. 1985) 10
United States v. O'Keefe
461 F.3d 1338 (11th Cir. 2006) 17

TABLE OF AUTHORITIES
(continued)

Page

United States v. Oplinger
150 F.3d 1061 (9th Cir. 1998) 10
United States v. Rivera
944 F.2d 1563 (11th Cir. 1991) 10
United States v. Salinas
480 F.3d 750 (5th Cir. 2007) 10
United States v. Zanabria
74 F.3d 590 (5th Cir. 1996) 10, 18
Wainwright v. Greenfield
474 U.S. 284 (1986) ..... passim

STATUTES

Cal. Pen. Code
§ 211 1
§ 12022.53(b) 1

STATEMENT OF THE CASE

This case concerns three armed robberies committed by petitioner and Casey Bowen in 2006 in Los Angeles County. A jury convicted petitioner of three counts of second degree robbery (Cal. Penal Code § 211) and found that petitioner personally used a firearm in two of the robberies (Cal. Penal Code § 12022.53(b)). The trial court sentenced petitioner to state prison for twelve years.

A. Prosecution's Case-In-Chief

1. The robberies

On May 18, 2006, petitioner robbed Refugio Gomez at gunpoint as the latter was walking home from work in Santa Monica. Gomez initially described the robber as "possibly Hispanic." A few days after the robbery, police officers showed Gomez two photographic lineups. Gomez selected petitioner's photograph as that of the robber but did not identify Bowen's photograph. At the preliminary hearing and at trial, Gomez identified petitioner, and excluded Bowen, as the robber. Gomez identified a gun stolen from Bowen's neighbor, Keshanna Spencer, as the gun used in the robbery.

On May 21, petitioner took Paul Tifford's wallet at gunpoint as the latter was walking to his car. Tifford's wallet contained approximately $20 in cash, as well as three credit cards, an ATM card, a social security card, a health card, and a gift card. The following day, police officers showed Tifford two photographic lineups. He identified petitioner as the person most closely resembling the robber. Tifford also identified petitioner at the preliminary hearing and at trial. He excluded Bowen as the robber.

Tifford identified the gun stolen from Spencer's apartment as the one used in the robbery.

Also on May 21, Bowen took Michael Silverman's wallet at gunpoint on 16th Street in Santa Monica. At the time, Silverman's wallet contained his driver's license, a debit card, and $2 in cash. A few days later, Silverman was shown "a couple" of photographic lineups. He identified Bowen as looking similar to the robber. Silverman also identified Bowen at the preliminary hearing. Silverman stated that petitioner was not the robber. Silverman identified the gun taken from Spencer's apartment as resembling the one used in the robbery.

2. The arrest

On May 21, about one hour after the Silverman robbery, Los Angeles Police Officers David Bambrick and Lilo Miaiva were on patrol in Venice when they observed a car driven by Bowen in which petitioner was a passenger. Officer Bambrick noticed that neither Bowen nor petitioner was wearing a seat belt. The officers made a U-turn and attempted to drive behind the Optima. The Optima accelerated and made several turns. Officer Bambrick saw petitioner leaning toward the open window on the passenger side of the car. The officers followed the Optima, as it ran a stop sign and then continued driving.

The Optima eventually stopped, and the officers initiated a traffic stop. Officer Miaiva asked Bowen for his license and then had him exit the car. Officer Miaiva searched Bowen and found Silverman's driver's license in Bowen's pants pocket. Bowen was placed in the patrol car. In the meantime, petitioner was still inside the Optima and was acting nervously, looking to his left and right. Officer Bambrick approached petitioner and told him to place his hands on the dashboard. Officer Bambrick then told

petitioner to exit the car and asked him, "Hey. What's going on? You know, what's up with the driving?" Petitioner did not respond and just stared straight ahead. Officer Bambrick handcuffed petitioner and placed him in the back of the police car.

Officer Bambrick returned to the area where he had seen petitioner leaning outside the car window during the chase. On the sidewalk, he found a .45-caliber semiautomatic handgun. A magazine containing eight live .45-caliber bullets was found nearby. Spencer later identified the handgun found on the sidewalk as the gun that had been stolen from her apartment.

3. The investigation

Santa Monica Police Detective Michael Bambrick was assigned to investigate this case. Detectives Bambrick and Richard Lewis searched the car and recovered two cellular telephones, some loose paper, cash, a plastic baggie containing what appeared to be marijuana, a car rental agreement from Enterprise in Bowen's name, a piece of notebook paper with writing on it, three grocery store receipts, a black and gray cap, a black hooded sweatshirt, a gray hooded sweatshirt, a camouflage bandanna, and a wallet with a social security card and a medical card in the name Paul Tifford. Tifford later identified the wallet as his.

Detective Bambrick flipped open one of the cellular telephones, which had a screen reading "My phone number is . . . ." Detective Bambrick called the number and heard a voice mail message in petitioner's voice. The message contained profanity and a Spanish phrase. Detectives Bambrick and Lewis reviewed the text messages stored in petitioner's cellular telephone. One of the messages

sent at 8:44 p.m. on May 21, 2006, stated, "Just a debit card, like, three. That's all they got. Pinche Putos."[1] The second cellular telephone that was recovered belonged to Bowen. The notebook paper found in the glove compartment had directions on it. The directions ended at a location close to where the Tifford robbery occurred. After petitioner and Bowen's arrest on May 21, 2006, there were no more similar robberies committed in Santa Monica.

Detective Bambrick had several conversations with Deborah Raff, petitioner's mother. Detective Bambrick informed Deborah about the crimes. Deborah never mentioned petitioner was home with her on May 18, 2006.

B. Defense Case

According to petitioner's mother, he was home in Santa Monica at the time of the robberies.

C. Factual Background and Court Rulings As to the Constitutional Issue Presented

In his case-in-chief, the prosecutor questioned Officer Bambrick about the circumstances of the traffic stop of the vehicle in which petitioner was a passenger. (Pet. App. 25-26.) The officer testified that, after getting petitioner to exit the car, he asked petitioner, "Hey. What's going on? You know, what's up with the driving?" (Pet. App. 26.) When the prosecutor asked, "And What, if anything, did he say?" Defense counsel objected and then asked for a sidebar hearing. (Pet. App. 27.)

---

[1] "Pinche Puto" means "fucking ass hole," "fucking mother fucker," or ""fucking fag" in Spanish.

At sidebar, the prosecutor noted petitioner did not respond to the questions and would not even look at the officer. (Pet. App. 27.) When defense counsel objected on *Miranda* grounds, the trial court pointed out that petitioner was not in custody and was not interrogated and that the officer's "preliminary investigatory" questions were not designed to elicit an incriminating response. (Pet. App. 27-28.) As to defense counsel's challenge to the relevancy of the evidence, the court found petitioner's silence showed a consciousness of guilt or a guilty knowledge. (Pet. App. 28-29.) Defense counsel did not ask for any limiting instructions about the silence evidence.

The prosecutor then asked Officer Bambrick what petitioner say or do in response to the officer's questions. The officer testified petitioner did not respond and "just kind of stared straight ahead." (Pet. App. 30.) The officer then testified that he handcuffed petitioner and placed him in the back of the patrol vehicle. (Pet. App. 31.) During her lengthy closing arguments, the prosecutor briefly mentioned petitioner's prearrest silence and told the jury that petitioner's nervous conduct and silence at the time of the traffic stop was inconsistent with the behavior of an innocent person. (Pet. App. 33-34.)

On direct appeal, petitioner claimed the prosecution's evidence and comments about his prearrest silence violated his Fifth Amendment rights. (Pet. App. 12-13.) In its unpublished opinion, the California Court of Appeal rejected this claim as follows,

> Raff was not under arrest and Officer Bambrick *was not investigating, nor was he even aware of, the robberies for which Raff was standing trial.* There is a split in the federal courts regarding whether the Constitution is violated when the prosecution comments on a defendant's

> silence occurring before his arrest and before he received *Miranda* warning, and uses that silence to argue consciousness of guilt. [Citation omitted.] [¶] But the cases finding a constitutional violation all involve questioning that occurred during the investigation of the charged offense. Raff cites no authority, nor have we found any, that the government violates the Constitution when it comments on the defendant's silence during noncustodial questioning unrelated to the crime with which the defendant is charged. Officer Bambrick did not ask Raff about or accuse him of any criminal behavior, and was unaware of the robberies. [Citation omitted.] The trial court properly admitted the evidence that Raff was silent when questioned after the traffic stop.

(Pet. App. 13-14.) (Italics in original.) The California Supreme Court denied review. (Pet. App. 22.)

REASONS WHY THE WRIT SHOULD BE DENIED

According to petitioner, this case presents an important question of Fifth Amendment jurisprudence left undecided by this Court in *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980): Can the State, in its case-in-chief, elicit testimony that a nontestifying defendant remained silent in the face of police questioning and affirmatively argue to the jury that this prearrest silence is evidence of guilt? (Pet. at 12.) Petitioner further asserts there is a conflict among the federal and state courts on the admissibility of prearrest silence as substantive evidence of guilt. (Pet. at 18-24.) Ultimately, petitioner asks this Court to grant certiorari and to reach the following holding: "the prosecution is forbidden from eliciting any testimony in [its] case-

in-chief or making any comment to the jury on the 'accused's silence' in the face of official questioning as affirmative evidence of guilt whether the 'right to remain silent' was exercised inside or outside of the courtroom, before or after *Miranda* warnings are given." (Pet. at 26.)

The petition should be denied for several reasons. First, petitioner has failed to show a genuine split of authority among the lower courts as to the crucial legal issue raised in this case, i.e., whether the prosecution could use as substantive evidence of guilt a non-testifying defendant's prearrest silence in response to non-accusatory police questioning unrelated to the charged offenses. Consequently, this case does not present a proper vehicle for resolving any alleged split of authority among the lower courts as to the constitutional issue left unresolved in *Jenkins*. Second, the California Court of Appeal correctly found no constitutional impediment to the admission of evidence and comment about petitioner's silence during noncustodial, non-accusatory police questioning unrelated to the charged crimes. For this Court to expand the exclusionary protections of the Fifth Amendment to the instant factual scenario would be unwarranted by this Court's precedents. Third, the opinion below was unpublished and lacks precedential value. Fourth, the challenged evidence was not a significant aspect of the prosecution's case and, as such, any alleged error would be clearly harmless in light of the evidence presented at trial. Thus, a resolution of the legal issue is not necessary herein. Accordingly, there are no compelling reasons for granting certiorari in this case.

I. THERE IS NO SPLIT OF AUTHORITY AMONG LOWER COURTS AS TO THE CRUCIAL LEGAL ISSUE RAISED BY THE UNIQUE FACTUAL SCENARIO HEREIN, AND THIS CASE DOES NOT PROVIDE AN ADEQUATE VEHICLE FOR RESOLVING THE ALLEGED CONFLICT ABOUT THE USE OF A DEFENDANT'S PREARREST SILENCE

As explained below, this Court has yet to rule on the specific issue of whether the prosecution could use a non-testifying defendant's prearrest silence as substantive evidence of guilt. Also, there is an apparent disagreement among the lower courts on the use of this prearrest silence. But this disagreement may be explained to a large extent by the different factual scenarios addressed by the courts. More importantly, there is no conflict or split of authority as to the crucial legal issue raised by the unique facts of this case, in which petitioner's prearrest silence was in response to brief, non-accusatory police questioning about a matter unrelated to the charged offenses. Thus, even if there were a split of authority among lower courts as to the issue left unresolved in *Jenkins*, this case does not provide an adequate vehicle to resolve such conflict.

A. Pertinent Law As to the Right to Remain Silent

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that a defendant's choice not to testify at trial cannot be used against the defendant as evidence of guilt either by the prosecutor in closing argument or the court in jury instructions. This Court reasoned the defendant should not be penalized for exercising a constitutional privilege. *Id.* at 613-15.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held "certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence." *Dickerson v. United States*, 530 U.S. 428, 431-32 (2000). The *Miranda* Court further stated the prosecution may not use at trial the silence of a defendant who exercises his Fifth Amendment privilege during a police custodial interrogation and stands mute in the face of accusation. *Miranda*, at 468 n.37.

In *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court applied the exclusionary rule set forth in *Miranda*'s footnote 37 and barred the impeachment use of a defendant's post-arrest, post-*Miranda* silence, because the *Miranda* warnings contained an implicit assurance that silence will not carry a penalty and it would be fundamentally unfair and a deprivation of due process to penalize the defendant for relying on the government's assurances. *Id.* at 616-20; *see also Wainwright v. Greenfield*, 474 U.S. 284, 289-95 (1986) (*Doyle* reasoning applies to substantive use of a defendant's post-arrest, post-*Miranda* silence).

This Court subsequently refused to extend *Doyle* to cases involving a defendant's pre-*Miranda* silence. *Fletcher v. Weir*, 455 U.S. 603, 604-07 (1982); *Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980). In *Jenkins*, this Court found the use of prearrest silence to impeach a defendant's credibility did not violate the Fifth Amendment or the fundamental fairness guaranteed by the Fourteenth Amendment, as no governmental action induced the defendant to remain silent before arrest. *Jenkins*, at 235-41. The *Jenkins* Court clarified that the probative value of prearrest silence is a question of state evidentiary law. *Id.* at 240. But the *Jenkins* Court did not consider whether or under what circumstances

prearrest silence may be protected by the Fifth Amendment. *Id.* at 236 n.2.

Relying on *Jenkins*, this Court in *Fletcher* reversed the lower court's broadening of *Doyle* to a defendant's post-arrest silence and clarified that *Doyle* applies only to cases where the government had induced silence by implicitly assuring the defendant in the *Miranda* warnings that his silence would not be used against him. *Fletcher*, 455 U.S. at 606; *Jenkins*, 447 U.S. at 240. Thus, in "the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," there is no constitutional violation in permitting cross-examination as to prearrest or post-arrest silence when a defendant chooses to testify. *Fletcher*, at 607.

The Fourth, Fifth, Ninth, and Eleventh Circuits, as well as some state courts, have allowed the use of a non-testifying defendant's prearrest silence as substantive evidence of guilt. *See, e.g.*, *United States v. Salinas*, 480 F.3d 750, 757 (5th Cir. 2007) (*Doyle* rationale applies only to post-*Miranda* silence); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (prearrest silence does not implicate *Doyle*, *Griffin*, Fifth Amendment, or Due Process Clause, because the constitutional privilege against compelled self-incrimination does not come into play); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (Fifth Amendment does not preclude evidence or comment on a defendant's prearrest silence that was not induced by nor a response to government action); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir. 1991) (government may comment on a defendant's pre-*Miranda* silence, regardless of whether defendant was arrested); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (officer's testimony regarding defendant's pre-*Miranda* silence was properly

admitted); *State v. Kinder*, 942 S.W.2d 313, 326 (Mo. 1996) (prearrest silence may be used as evidence of consciousness of guilt); *State v. Leecan*, 504 A.2d 480, 484-85 (Conn. 1986) (no constitutional impediment to use of prearrest silence as evidence of guilt); *State v. Helgeson*, 303 N.W.2d 342, 348-49 (N.D. 1981) (defendant's silence in response to a prearrest accusation did not implicate the Fifth Amendment).

Other circuits and state courts have held the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination. Although recognizing the *Doyle* due process rule is inapplicable to pre-*Miranda* silence, these courts instead believe the *Griffin* rule (which prohibits the prosecution from referring to the defendant's failure to testify at trial) applies to a non-testifying defendant's prearrest silence. According to those authorities, the privilege against self-incrimination may be asserted by a suspect who is questioned during the investigation of a crime, and a suspect's silence in the face of such questioning is akin to an invocation of the Fifth Amendment privilege against self-incrimination. *See, e.g., Combs v. Coyle*, 205 F.3d 269, 279-86 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1565-68 (1st Cir. 1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1015, 1017-18 (7th Cir. 1987); *State v. Leach*, 807 N.E.2d 335, 339-42 (Ohio 2004); *State v. Easter*, 922 P.2d 1285, 1290-92 (Wash. 1996); *State v. Rowland*, 452 N.W.2d 758, 762-63 (Neb. 1990); *State v. Fencl*, 325 N.W.2d 703, 710-11 (Wis. 1982).[2]

---

[2] Many of the state cases cited by petitioner actually avoided the Fifth Amendment issue and, instead, excluded the evidence on state law grounds. *See, e.g., People v. Welsh*, 80

(continued...)

B. The Unique Circumstances of Petitioner's Silence Set This Case Apart from Those Finding a Fifth Amendment Violation

As expressly found by the California Court of Appeal (Pet. App. 13-14), the instant case turns on its facts and is distinguishable from, and therefore not in conflict with, cases finding a Fifth Amendment violation as a result of the prosecution's use of a defendant's prearrest silence as substantive evidence of guilt. Here, petitioner was not a suspect of any crime at the time of the traffic stop, the questioning was unrelated to the charged crimes, and petitioner could not have understood the questions to be part of a criminal investigation into the robberies charged herein. Officer Bambrick's two innocuous questions were directed at Bowen's driving and were pertinent to the subject of the traffic stop. Officer Bambrick was unaware that petitioner and Bowen had committed the charged robberies and knew only that petitioner was a passenger in the car and was not wearing a seat belt. There was no indication or implication in the questions that petitioner had anything to do with Bowen's decision to flee with the police in pursuit.

Also, there was nothing in the questioning, or the surrounding circumstances, that would have led to the conclusion that petitioner felt he was being interrogated about the robberies and that, consequently, he was invoking his Fifth Amendment right to remain silent. As found by the trial court (Pet. App. 28), the questions were not designed to elicit an

---

(...continued)
P.3d 246, 306-08 (Colo. 2003); *Landers v. State*, 508 S.E.2d 637, 638 (Ga. 1998); *Tortolito v. State*, 901 P.2d 387, 389-90 (Wyo. 1995); *People v. De George*, 541 N.E.2d 11, 12 (N.Y. 1989).

incriminating response about the charged robberies, as they focused on Bowen's driving and petitioner was just a passenger in the car.

No court has found a Fifth Amendment violation without first being certain the facts surrounding the prearrest silence showed the defendant had either explicitly or implicitly (i.e., by remaining silent) invoked his right to remain silent with respect to the charged crimes. In those cases resulting in a Fifth Amendment violation, officers were investigating the charged crimes, the defendants were possible suspects, the questioning was related to the charged crimes, and it was clear from the facts that the defendants did not want to talk to the police about the charged crimes. The courts concluded that, after a defendant had exercised his right to remain silent and had continued to exercise this right throughout trial, it was impermissible for the prosecution to present evidence or comment about the defendant's "silent" invocation of the Fifth Amendment rights. *See, e.g.*, *Combs*, 205 F.3d at 279-86 (defendant stated, "Talk to my lawyer," when questioned at gunpoint by officer about charged crime and after being placed in custody); *Burson*, 952 F.2d at 1200-01 (defendant refused to respond to I.R.S. investigators' questions about his tax affairs during the course of a criminal investigation); *Coppola*, 878 F.2d at 1565-68 (defendant, who was considered a suspect, told investigating officers he was not going to confess and would not talk without a lawyer); *Lane*, 832 F.2d at 1015, 1017-18 (defendant told police he did not want to talk about the murders); *Leach*, 807 N.E.2d at 336-37 (defendant told investigating officers he wanted to speak to an attorney before answering the officers' questions); *State v. Dunkel*, 466 N.W.2d 425, 438 (Minn. App. 1991) (use of counseled prearrest, pre-

Miranda silence in the state's case-in-chief was erroneous, since it was akin to post-*Miranda* silence); *Fencl*, 325 N.W.2d at 710 (defendant told investigating officer he did not want to be interviewed before talking to his lawyer).

In contrast to those cases resulting in Fifth Amendment violations, the facts herein do not raise a reasonable inference that petitioner, who was not a suspect in any crime, invoked his Fifth Amendment right to remain silent as to the charged robberies when he failed to respond to innocuous, non-accusatory questioning by the officer about a matter unrelated to the robberies. Under the particular circumstances of this case, petitioner's silence was not akin to an invocation of his Fifth Amendment right to remain silent as to the charged crimes. Lacking this fundamental aspect or prerequisite of a Fifth Amendment violation (i.e., a defendant's explicit or implicit invocation of a Fifth Amendment right), petitioner's prearrest silence does not implicate the Fifth Amendment even under the reasoning of those cases barring the use of a defendant's prearrest silence.[3]

In sum, the underlying decision in this case does not conflict with the cases finding a Fifth Amendment violation from the use of a defendant's prearrest silence, since this case involves a unique factual scenario materially distinguishable from those cases. In other words, the outcome of this case

---

[3] The Sixth Circuit (which otherwise has taken a position against the use of prearrest silence as evidence of guilt) declined to find a constitutional violation with respect to trial testimony about a defendant's exercise of his right to remain silent in the face of investigatory questioning, where the silence did not relate to the matter for which the defendant was charged and tried. *United States v. Ahmed*, 472 F.3d 427, 435 (6th Cir. 2006).

would be unaffected by a resolution of the asserted conflict or split of authority among lower courts concerning the application of *Griffin* to prearrest silence. In addition, the instant case involves an unpublished opinion of an intermediate state court that lacks precedential value and that avoided addressing the broad legal issue raised by petitioner. For the foregoing reasons, this case presents a very poor vehicle for this Court to resolve the apparent split of authority on the broader issue left unresolved in *Jenkins*.

Furthermore, the apparent conflict or split of authority among courts on the use of prearrest, pre-*Miranda* silence could be explained to a large extent by the different factual scenarios presented in those cases. As demonstrated by the cases cited above, courts have been more willing to find a constitutional violation where the police questioning focused on the charged crimes and the defendant stated or clearly implied he did not want to talk to law enforcement about the crimes. In contrast, courts have declined to find a Fifth Amendment violation where the defendant was not questioned by police about the charged crimes and simply remained silent or did not come forward with information about the crimes. Also, as noted in footnote 2, *ante*, many state courts have declined to rule on the Fifth Amendment issue and, instead, have focused on the state evidentiary issues, such as probative value. Ultimately, this case, with its unique factual scenario, is an even less appropriate case to resolve any issue left unaddressed by *Jenkins*.

II. The State Court Correctly Found No Constitutional Impediment to the Use of Petitioner's Prearrest Silence in Response to Non-Accusatory Questioning Unrelated to the Charged Offenses

As noted above, the state decision herein did not take a definite position on the broad issue of whether or under what circumstances the use of a defendant's prearrest silence as substantive evidence of guilt may violate the Fifth Amendment. Instead, the court correctly found no precedent for barring evidence and comment about petitioner's prearrest silence under the unique circumstances of this case. Nevertheless, petitioner now seeks certiorari to ask this Court for an exclusionary rule that would prevent the use of a defendant's prearrest silence even under the circumstances of this case. There is no precedent for petitioner's overly broad interpretation of the Fifth Amendment, and this Court should refuse his invitation to expand its holding in *Griffin* to the circumstances of this case.

There is no conflict among the lower courts that *Doyle* is inapplicable to pre-*Miranda* silence. As this Court clarified in *Fletcher* and *Wainwright*, the *Doyle* rule applies only to cases where the government has induced the silence by implicitly assuring the defendant in the *Miranda* warnings that his silence would not be used against him. *Wainwright*, 474 U.S. at 291-93; *Fletcher*, 455 U.S. at 606; *see also Greer v. Miller*, 483 U.S. 756, 763 (1987). As this Court has explained, "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." *Wainwright*, at 292. In other words, a *Doyle* violation

presupposes that a defendant had a constitutional right to remain silent and that the defendant had been implicitly or explicitly assured his silence will not be used against him at trial. But it is only the right to remain silent after the *Miranda* warnings that is of constitutional dimension. *Id.* at 293; *United States v. O'Keefe*, 461 F.3d 1338, 1347 (11th Cir. 2006) ("there can be no *Doyle* violation until after a person is given *Miranda* warnings and the assurances implicit therein").

This Court's Fifth Amendment jurisprudence does not support the position that *Griffin* applies to the prosecution's use of a defendant's prearrest, pre-*Miranda* silence as substantive evidence of guilt, especially under the particular circumstances of this case. *Griffin*, which preceded but was not relied upon by *Doyle*, involved comment on a defendant's failure to testify at trial and did not purport to address the propriety of prosecutorial comment on a defendant's pretrial silence. *Griffin*, 380 U.S. at 613-15. In *Miranda*, this Court extended the Fifth Amendment protections to a defendant who stands mute or claims his privilege against self-incrimination "in the face of accusation" when the defendant is "under police custodial interrogation." *Miranda*, 384 U.S. at 468 n.37. Subsequently, *Doyle* and *Wainwright* established exclusionary rules against the use of post-arrest, post-*Miranda* silence. *Wainwright*, 474 U.S. at 289-95; *Doyle*, 426 U.S. at 616-20. *Fletcher* and *Jenkins* clarified *Doyle* and its progeny do not apply to cases involving a defendant's pre-*Miranda* silence, when the evidence is presented to impeach the defendant's testimony. *Fletcher*, 455 U.S. at 604-07; *Jenkins*, 447 U.S. at 239-40.

Whereas *Griffin* concerned a defendant's right to remain silent at trial, *Miranda* and *Doyle* specifically dealt with the right to remain silent prior

to trial and identified a defendant's arrest or custodial questioning as the triggering event for the Fifth Amendment protections. Prior to arrest, a defendant is not entitled to receive any assurance that his silence would not be used against him at a trial and cannot invoke his *Miranda* rights "anticipatorily," even if the defendant may decline to answer an officer's questions. *See Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (persons temporarily detained pursuant to traffic stops are not "in custody" for *Miranda* purposes); *see also McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991) ("We have in fact never held a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'"). In other words, the defendant's prearrest silence does not possess the same constitutional dimension as post-arrest, post-*Miranda* silence or a defendant's decision not to testify at trial, and may be used as evidence of guilt at trial. *See Wainwright*, 474 U.S. at 293 ("The right of silence after *Miranda* warnings is of constitutional dimension"); *Zanabria*, 74 F.3d at 593 (Fifth Amendment "protects against compelled self-incrimination but does not . . . preclude the proper evidentiary use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference").

In his concurring opinion in *Jenkins*, Justice Stevens pointed out that a defendant's decision not to testify at trial and a defendant's silence in a prearrest context "are fundamentally different" situations, which are not "constitutionally indistinguishable." (*Jenkins*, 447 U.S. at 241 (Stevens, J., concurring). As Justice Stevens explained,

> In the trial context it is appropriate to presume that a defendant's silence is an

exercise of his constitutional privilege and to prohibit any official comment that might deter him from exercising that privilege. For the central purpose of the Fifth Amendment privilege is to protect the defendant from being compelled to testify against himself at his own trial. Moreover, since a defendant's decision whether to testify is typically based on the advice of his counsel, it often could not be explained without revealing privileged communications between attorney and client. [¶] These reasons have no application in a prearrest context. The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out. When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment ["No person . . . shall be compelled in any criminal case to be a witness against himself"]. . . . Consequently, I would simply hold that the admissibility of petitioner's failure to come forward with the excuse of self-defense shortly after the stabbing raised a routine evidentiary question that turns on the

> probative significance of that evidence and presented no issue under the Federal Constitution.

Id. at 242-44 (footnotes omitted).

Under the particular circumstances of this case, there was no constitutional impediment to the use of petitioner's prearrest, pre-*Miranda* silence as substantive evidence of guilt. First, petitioner's silence lacked "constitutional dimension," since petitioner was simply detained as part of a traffic stop, was not subjected to custodial questioning, and was not entitled to invoke his *Miranda* rights "anticipatorily." *See McNeil*, 501 U.S. at 182 n.3; *Berkemer*, 468 U.S. at 440. It is irrelevant whether the officers intended to detain or arrest petitioner at the time of the questioning, as the officers' subjective intentions were not communicated to petitioner. *Berkemer*, at 442. Ultimately, the officers were permitted to ask petitioner questions pertinent to the traffic stop without having to warn him about his *Miranda* rights. But petitioner was not under official compulsion to answer any questions prior to his arrest. *Id.* at 439-40. Under these circumstances, the Fifth Amendment was not implicated. *See Jenkins*, 447 U.S. at 242-44 (Stevens, J., concurring).

Second, unlike the defendants in *Doyle* or *Wainwright*, petitioner was not explicitly or implicitly assured by the officers that his silence would not be used against him at trial. Consequently, there was no fundamental unfairness in the use of his silence at trial. Third, the circumstances surrounding petitioner's silence do not support a reasonable inference that he actually invoked his right to remain silent as to the charged crimes prior to his arrest. As already shown, petitioner was just a passenger in a car stopped for traffic violations, was not interrogated about the

charged crimes, and had no reason to exercise his right to remain silent as to the charged crimes. The officer's questioning involved two innocuous, non-accusatory questions unrelated to petitioner's crimes. Even though in retrospect the failure to respond was probative on guilty knowledge, there still was no reason for petitioner to believe the questions, on their face, called for an incriminating answer. Thus, unlike the defendants in *Griffin*, *Doyle*, and *Wainwright*, petitioner did not actually invoke his constitutional right to remain silent as to the charged crimes, even if he were entitled to do so, and his prearrest silence was not protected by the Fifth Amendment.

Accordingly, the state court correctly denied petitioner's claim of error. This Court should not grant certiorari to adopt petitioner's proposed rule of law, which would broadly expand the scope of *Griffin* to a factual scenario never accepted by this or any other court. *See, e.g.*, *McNeil*, 501 U.S. at 182 (guidelines for judicial review should be "clear and unequivocal . . . but only when they guide sensibly and in a direction we are authorized to go"; declining to expand the Sixth Amendment right to counsel).

III. The Legal Issue Need Not Be Resolved Because the Opinion Below Lacks Precedential Value and the Alleged Error Was Harmless

Finally, certiorari should be denied because the legal question raised by petitioner need not be resolved herein. As previously noted, the opinion below was not issued by the state's highest court, was unpublished, and lacks any precedential value. Moreover, the alleged error was harmless beyond a reasonable doubt, in light of the strong evidence of guilt presented at trial and the minimal role played

by the challenged evidence and comment at trial. *See Chapman v. California*, 386 U.S. 18, 24 (1967). In other words, it is not important for this Court to resolve the question presented because it would make no difference to the legal landscape or the outcome of the case.

Petitioner's silence was not a significant aspect of the prosecution's case. For example, the challenged testimony covered less than one page of the lengthy trial transcript, and the prosecutor mentioned very briefly petitioner's silence during his closing arguments (in less than ten lines of about forty-seven pages). The prosecutor presented other unchallenged evidence of consciousness of guilt, such as petitioner's nervous conduct at the time of the traffic stop and his throwing of the handgun, which was used in the robberies, out of the car during the police pursuit. Certainly, petitioner's attempt to dispose of the handgun was far more significant and probative than his failure to respond to two questions unrelated to the charged crimes.

Furthermore, the evidence against petitioner was overwhelming. The victims' identification testimony unquestionably was the most significant aspect of the prosecution's case. Petitioner was identified at trial by both Gomez and Tifford, who expressed no doubts about their identifications. At the time of the robbery, Gomez was able to see petitioner's face from up close for several minutes, and the area was well lit. Although Gomez initially described the robber as older and smaller than petitioner, Gomez explained he was uncertain about the size and age of the robber because the robber was wearing a hooded sweatshirt. After having the opportunity to see petitioner from close range and standing up at trial, Gomez verified his identification. Gomez also selected petitioner from a

photographic lineup days after the robbery and identified him at the preliminary hearing. In contrast, Gomez was certain Bowen was not the robber.

At trial, Tifford identified petitioner without a doubt, despite petitioner's change of appearance between the robbery and trial. To the police, Tifford described the robber as "perhaps Hispanic" or a light-skinned Black, about 5'10", twenty to thirty years old, and 150 pounds. Tifford initially speculated the robber could be Black because of the slang used by the robber. Tifford testified petitioner could be Hispanic in his appearance and looked in his twenties. Tifford identified petitioner from a photographic lineup and at the preliminary hearing. He excluded Bowen as the robber at preliminary hearing and trial. At trial, Tifford still had a "very strong" mental image of the robber. According to the investigating officer, petitioner was much heavier at the time of trial than on May 21, 2006, which explained the discrepancies in the victims' testimony about his weight. Moreover, the identification testimony of Gomez and Tifford was cross-corroborative, as petitioner used a similar modus operandi during both robberies.

Aside from the eyewitness identification testimony, petitioner was in the car with Bowen when they were stopped by the police. The police stop occurred approximately an hour after the Silverman robbery was committed. Bowen had Silverman's driver's license in his pocket. The gun petitioner threw from the car was the weapon used in the crimes. Many items found in the car, such as the hooded sweatshirts, directions, bandanna, Tifford's wallet, social security card, and medical card, all linked petitioner and Bowen to the robberies. Further, petitioner had sent a text message to a

friend listing the items that were taken from Silverman and/or Tifford. Silverman identified Bowen as the person who robbed him. The above evidence overwhelmingly established petitioner personally perpetrated two robberies and assisted Bowen in the commission of a third robbery. All petitioner could offer against this overwhelming evidence of guilt was his mother's alibi testimony. Not surprisingly, it took the jury little over two hours to find petitioner guilty of all charges and special allegations.

In sum, any error in admitting evidence and argument at trial about petitioner's silence in response to Officer Bambrick's questions at the time of the traffic stop was harmless beyond a reasonable doubt. And this Court therefore need not resolve the legal question presented by petitioner, which is irrelevant to the ultimate outcome of this case.

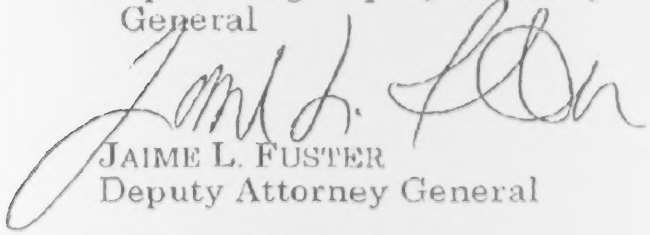
CONCLUSION

The petition for writ of certiorari should be denied.

Dated: May 12, 2010

Respectfully submitted

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
PAUL M. ROADARMEL, JR.
Supervising Deputy Attorney General



JAIME L. FUSTER
Deputy Attorney General

Counsel of Record
Counsel for Respondent

LA2010501169
50639312.doc

No. 09-875

Supreme Court, U.S.
FILED
MAY 25 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSHUA ELI RAFF,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

REPLY BRIEF

DAVID V. KIRBY
BARBARA E. O'CONNOR
O'CONNOR & KIRBY, P.C.
174 Battery Street, 3rd Floor
Burlington, VT 05401
(802) 863-0112
David@KirbyOConnor.com

JOSHUA C. NEEDLE
Counsel of Record
JOSHUA C. NEEDLE, ESQ.
171 Pier Avenue, No. 192
Santa Monica, CA 90405
(310) 428-1092
jcneedle@verizon.net

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
PRELIMINARY STATEMENT	1
I. THIS CASE CLEANLY POSES THE QUESTION RESERVED IN *JENKINS v. ANDERSON*	2
A. The Subjective Knowledge and Intent of the Officer Is Irrelevant	2
B. The Decision Below Was Incorrect	5
II. USE OF PETITIONER'S SILENCE AS EVIDENCE AND THE PROSECUTOR'S ARGUMENT THEREON WERE NOT HARMLESS	10
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

Berkemer v. McCarty, 468 U.S. 420 (1984) ..... *passim*

Chapman v. California, 386 U.S. 18 (1967) 10, 12, 13

Doyle v. Ohio, 426 U.S. 610 (1976) 8

Fletcher v. Weir, 455 U.S. 603 (1982) 8, 9

Florida v. Royer, 460 U.S. 491 (1983) 1, 5

Griffin v. California, 380 U.S. 609 (1965) 5, 9, 12

Grunewald v. United States, 353 U.S. 391 (1957) 4

Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004) 1, 6, 7, 8, 9

Hoffman v. United States, 341 U.S. 479 (1951) 3

Jenkins v. Anderson, 447 U.S. 231 (1980) 2, 8, 9

Kastigar v. United States, 406 U.S. 441 (1972) 3, 5

Malloy v. Hogan, 378 U.S. 1 (1964) 1, 6, 8, 9

McNeil v. Wisconsin, 501 U.S. 171 (1991) 6

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

New York v. Quarles, 467 U.S. 649 (1984) 3

Rhode Island v. Innis, 446 U.S. 291 (1980) 3

Terry v. Ohio, 392 U.S. 247 (1984) 5, 6, 7, 8

United States v. Hale, 422 U.S. 171 (1975) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Wade, 388 U.S. 218 (1967) 11

Whren v. United States, 517 U.S. 806 (1996).....3

STATE CASES

People v. Raff, 2009 WL 2035874 (2009) 9

REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

While this Court has given no definitive statement on the precise scope of the Fifth Amendment right not to be compelled to incriminate oneself[1] in the context of a police stop, its cases allow little room for debate. "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). A person approached by a police officer "may decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 498 (1983). If "detained" "the detainee is not obliged to respond" to any questions posed by an officer. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1983). The only information that an officer can constitutionally compel is the person's name. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004).

Given these pronouncements, it seems clear that when LAPD Officer David Bambrick detained Joshua Raff and questioned him, Raff had a right to remain silent. The question that this case poses is whether the prosecution can eviscerate that right by introducing

---

[1] " . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." (*Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

Raff's exercise of it and arguing that his silence was affirmative evidence of his guilt.

This is the question reserved in *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980): "Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment."

I. THIS CASE CLEANLY POSES THE QUESTION RESERVED IN *JENKINS v. ANDERSON*.

Respondent agrees that this Court has yet to answer the question reserved in *Jenkins* and that a fundamental split on that question exists among the Circuits and the State Courts. Respondent, however, argues that this case is so "unique" that this Court should remain silent on the question and allow the split to fester.

A. The Subjective Knowledge and Intent of the Officer Is Irrelevant.

The uniqueness Respondent relies upon is that Officer Bambrick, when questioning Raff, did not know about the robberies Raff would later be charged with. This is a facile distinction that is irrelevant to the outcome of the issue. It made no difference to Raff what the officer knew since his answers to the officer's questions would have been as potentially

incriminating[2] whether the officer was specifically seeking information about the robberies or not, and only Raff's perspective is relevant.

This Court has consistently avoided having constitutional questions turn on the subjective knowledge or intent of the officer. *Berkemer v. McCarty*, *supra*, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Rhode Island v. Innis*, 446 U.S. 291, 301, (1980) (subjective intent of police officer to obtain incriminatory statement not relevant to whether an interrogation has occurred); *Whren v. United States*, 517 U.S. 806, 813, (1996) (refusing to evaluate Fourth Amendment reasonableness in light of the officers' motivations); *New York v. Quarles*, 467 U.S. 649, 655-656, and n.6, (1984) (subjective motivation of officer irrelevant in considering whether the public safety exception to *Miranda* is applicable).

The appropriate focus is not on what the questioner knows or is seeking but on what the witness reasonably believes an answer will disclose. In *Kastigar v. United States,* 406 U.S. 441, 445, (1972), the Court plainly said that the Fifth Amendment

---

[2] A statement is potentially incriminating if it "would furnish a link in the chain of evidence needed to prosecute him." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

privilege against self-incrimination "protects against any disclosures *that the witness reasonably believes* could be used in a criminal prosecution or could lead to other evidence that might be so used." (Emphasis added.)

Respondent strives to characterize the officer's questions as "innocuous," but this simply was not the case. Bambrick described the encounter as an "evasive" chase that ended with a compelled stop and the immediate handcuffing and arrest of the driver, Bowen. Simultaneously, Bambrick detained Raff – directing him to place his hands on the dashboard or on his knees – and then ordered him out of the car, and when Raff did not respond to Bambrick's questions he too was immediately arrested. While Bambrick might not have known what Bowen and, for the sake of argument, Petitioner were running from, he was certainly probing to find out. This is not, as Respondent tries to present it, a situation in which an officer is simply asking innocuous questions.

Rather, Bambrick was interrogating Raff with questions that if answered would at the very least have connected him with Bowen, and in *Grunewald v. United States*, 353 U.S. 391, 421-422 (1957) this Court agreed that acknowledging a pre-existing relationship with a suspect provides an incriminating "link": " . . . [H]ad Halperin stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent. . . ."

Under the circumstances of his detention Raff reasonably believed he was being asked questions the answers to which "could be used in a criminal prosecution or could lead to other evidence that might be so used," and Respondent's argument that the officer's knowledge was determinative has no merit.

B. The Decision Below Was Incorrect.

Respondent next argues that the decision below was correct, and thus, certiorari should not be granted. We obviously disagree. Respondent's analysis misses the mark in at least two broad respects: It confuses impeachment cases with substantive use cases and it mischaracterizes the scope and reach of the constitutional right to remain silent.

This Court's precedents say that a person has the right to remain silent in virtually any investigative or prosecutorial encounter with the authorities. This extends from the trial context, *Griffin v. California*, 380 U.S. 609 (1965), investigative grand juries, *Kastigar v. United States,* 406 U.S. 441, 444 (1972), and formal custodial interrogations (*Miranda v. Arizona*, 384 U.S. 436 (1966), as well as to less formal situations such as police-citizen encounters, *Florida v. Royer*, *supra*, 460 U.S. 491, 498 (1983), detentions short of arrest, *Terry v. Ohio*, 392 U.S. 247, 29 (1984), and traffic stops, *Berkemer v. McCarty*, *supra*, 468 U.S. 420, 439-440 (1983), where the Court explained:

> * * * , the usual traffic stop is more analogous to a so-called "*Terry* stop," *see Terry v. Ohio,* 392 U.S. 1 (1968), than to a formal

> arrest. . . . "[T]he stop and inquiry must be *reasonably related in scope to the justification for their initiation.*" *Ibid.* (*quoting Terry v. Ohio, supra, at* 392 U.S. 29.) *Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond.* (Footnotes omitted, *emphasis* in original.)[3]

The only exception to these rulings that the Court has recognized – in which a person can be compelled under penalty of arrest and prosecution to disclose information – actually underscores the breadth of the rule. In *Hiibel v. Sixth Judicial District Court Of Nevada, Humboldt County*, *supra*, 542 U.S. 177 (2004), the Court recognized a carefully

---

[3] Contrary to another of Respondent's arguments (Opp. 18), Raff is relying upon, not challenging, *Berkemer*, and is not arguing that "*Miranda* warnings" should have been given at or before the time that he chose to remain silent. Our position is simply that per *Malloy* and other relevant precedent, the Fifth Amendment guaranteed him a right to remain silent and that having exercised that right his silence could not be used to his detriment at trial whether he'd been informed, warned or reminded of this right by the police or anyone else. (Pet. 26-27) Respondent's "anticipatory invocation" argument and reliance on *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991) is particularly inapt since, as Justice Scalia notes in beginning the opinion, "This case presents the question whether an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding constitutes an invocation of his *Miranda* right to counsel," which has nothing to do with the case at hand.

limited exception to the right to remain silent in the face of police questioning in requiring a detained person only "to disclose his name in the course of a valid *Terry* stop." *Id.* at 188. That exception was recognized only because the Court concluded that the Nevada law was extremely narrowly drawn and that disclosing one's name "is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." (*Id.* at 191) It was further circumscribed by a finding that, "In this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him," or that it "would furnish a link in the chain of evidence needed to prosecute" him. *Id.* at 190. Mr. Hiibel apparently just didn't think his name was any of the officer's business and, believing the constitution was on his side, stood his ground.

The dissenters would not have approved even this miniscule exception to the "broad constitutional right to remain silent." (*Id.* at 192, Stevens, J., dissenting.) In a separate dissent Justice Breyer wrote:

> This lengthy history of concurring opinions, of references, and of clear explicit statements means that the Court's statement in *Berkemer*, while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years. *Id.* at 198.

This case presents the Court with the opportunity to decide squarely if the promises made in

cases such as *Terry*, *Berkemer* and *Hiibel* are merely dicta or carry the force of constitutional law.

Respondent, on the other hand, seems to suggest that the Fifth Amendment's right to remain silent is coextensive only with the scope of *Miranda* warnings. While *Miranda* protected and strengthened the "right to remain silent" by requiring that a person about to be interrogated in custody be warned of his rights, it did not change *Malloy's* definition or reach of the right itself, which are clearly independent of and pre-exist the warning. Respondent's claim that "it is only the right to remain silent after the *Miranda* warnings that is of constitutional dimension" (Opp. at 17) is simply wrong. As pointed out above and in our Petition, the right extends to virtually any encounter with authorities.

Finally, Respondent also confuses "substantive use" cases with impeachment cases notwithstanding that, "[A]s long ago as *Raffel v. United States*, 271 U.S. 494, this Court recognized the distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes." *Jenkins v. Anderson*, 447 U.S. 231, 241 (Stevens, J. dissenting.).

The *impeachment* cases relied on by Respondent – *Doyle v. Ohio*, 426 U.S. 610 (1976), *Jenkins v. Anderson*, 447 U.S. 231 (1980) and *Fletcher v. Weir*, 455 U.S. 603 (1982) – simply address a different constitutional question and use a different constitutional analysis to decide them. Raff is not challenging

these cases and Respondent's reliance on them is misplaced.

For these reasons and more to be addressed in a merits brief if certiorari is granted, Petitioner believes that *Malloy*, *Griffin*, *Hiibel* and the Court's other cases applying the self-incrimination clause establish a general, constitutional rule prohibiting *substantive* use of a individual's silence in the face of virtually any official questioning, while *Jenkins* and *Weir* create exceptions to that rule limited to the *impeachment* context based on a separate and distinct due process analysis that uses the giving of *Miranda* warnings as a demarcation point.

After thirty years of rampant confusion the opportunity to clarify these questions of fundamental Fifth Amendment jurisprudence concerning the use of a detainee's silence as affirmative evidence of guilt is squarely before the Court.[4]

---

[4] Respondent also urges that certiorari be denied because the decision below was not published, and while it is true that the decision below is not in the official reports it is easily located on Westlaw, *People v. Raff*, 2009 WL 2035874 (2009). This argument might have some merit were this the first decision to create a conflict, but it is not. The conflict here has been discussed and debated for 30 years, ever since *Jenkins* left the question unanswered, and the remarkable spectrum of opinion on the question that has resulted is explored at Pet. 18-24 and in the cases cited therein.

II. USE OF PETITIONER'S SILENCE AS EVIDENCE AND THE PROSECUTOR'S ARGUMENT THEREON WERE NOT HARMLESS.

Respondent claims that any error in admitting evidence of Petitioner's silence and allowing the prosecutor to argue it as substantive evidence of guilt was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, (1967). This clearly is not so.

The case against Raff was anything but strong. He was identified by two witnesses at trial, both of whom initially described someone quite different from Raff to the police. Mr. Gomez described the robber as man in his thirties, 5' 6", 160 pounds. Nonetheless, at trial, he identified Raff, *who is 19 years old, 5' 9", 200 pounds*, as the robber.[5] Mr. Tifford, who is himself Black, described the robber to police as a "male Hispanic or a Black person," 5' 8", 150 pounds. He nonetheless identified Raff, who is *Caucasian, 5' 9", 200 pounds,* as the robber at trial.

The circumstantial evidence pointed almost exclusively to Bowen as the robber. (*See* Pet., at 9.) Thus, the prosecution of Raff was founded on the

---

[5] Respondent curiously explains these discrepancies (Opp. 22) by acknowledging that Mr. Gomez didn't actually get a very good look at the robber: "[A]lthough Gomez initially described the robber as older and smaller than petitioner, Gomez explained he was uncertain about the size and age of the robber because the robber was wearing a hooded sweatshirt."

exceptionally weak identifications,[6] the fact that he was in Bowen's car and his silence. The silence, coming when Raff had just been ordered from Bowen's car, was particularly harmful as it seemed to tie him to Bowen and the items in the car far more than just his mere presence as a passenger.

As this Court has noted, admission of silence can be particularly devastating. "Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted." *U.S. v. Hale*, 422 U.S. 171, 180 (1975). When used as substantive evidence of guilt it has even greater potential to prejudice the jury.

Respondent tries to prop up its claim by overstating the evidence. Two instances in particular are easily refuted.

First, Respondent claims a number of times that Raff personally threw the handgun "out of the car during the police pursuit." (Opp. at 22.) In actuality, Officer Bambrick's testimony supports no such definitive statement. All Bambrick saw was that during the chase Petitioner's body appeared "as if he's leaning somewhat out the passenger window." Bambrick

---

[6] "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *U.S. v. Wade*, 388 U.S. 218, 228-29 (1967).

never saw Petitioner extend his hand out the window, *never* saw anything in his hand, *never* saw him toss anything, and "couldn't tell you" if anything was thrown from the car. (This trial testimony is attached and appears at App. 2-3) Advocates are entitled to argue reasonable inferences from incomplete facts but they are not allowed to argue them as if they are "unchallenged" facts.

Second, Respondent makes a bold statement (Opp. 4) that after the arrests of Bowen and Raff "there were no more similar robberies committed in Santa Monica." Such hyperbole is valueless since the "support" for this is Bambrick's testimony, in response to a single question, only that he was personally unaware of any local crimes that "resembled this type of M.O." In any event, such a claim is meaningless and misleading as to Raff since if Bowen was the sole perpetrator the same "result" would be true.

Chapman itself belies Respondent's harmless error argument. Regarding the improper use of trial silence against Mr. Chapman (*Griffin* error), this Court wrote:

> [T]hough the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners (citation omitted) it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has

> demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions.

386 U.S. at 26.

If with "reasonably strong" evidence against Chapman, it was "completely impossible" for the State to meet the "harmless error" test, in a case as frail as the one against Joshua Raff establishing "beyond a reasonable doubt" that the error in this trial "did not contribute to petitioners' conviction" lies somewhere beyond "completely impossible."

CONCLUSION

Certiorari should be granted in this case to resolve the clearly presented issues of fundamental Fifth Amendment jurisprudence that have troubled the lower courts for some thirty years.

Respectfully submitted,

DAVID V. KIRBY
BARBARA E. O'CONNOR
O'CONNOR & KIRBY, P.C.
174 Battery Street,
3rd Floor
Burlington, VT 05401
(802) 863-0112

JOSHUA C. NEEDLE
Counsel of Record
JOSHUA C. NEEDLE, ESQ.
171 Pier Avenue, No. 192
Santa Monica, CA 90405
(310) 428-1092

COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	
VS.	NO. SA060350
JOSHUA ELI RAFF, DEFENDANT-APPELLANT.	MAR 25 2008

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE KATHERINE MADER, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

JUNE 5, 2007

APPEARANCES:

FOR THE RESPONDENT: EDMUND G. BROWN, JR.
STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, SUITE 1701
LOS ANGELES, CALIFORNIA
90013

FOR THE APPELLANT: LAW OFFICE OF
JOSHUA C. NEEDLE
171 PIER AVENUE
SUITE 192
SANTA MONICA, CALIFORNIA
90405

VOLUME 3 OF 4
PAGES 601 THROUGH 757/900

TRACI THOMAS, CSR #9620
OFFICIAL REPORTER

* * *

[658] Ronald White Q SO YOU'RE FOLLOWING A VEHICLE. AND AT SOME POINT YOU SAW THE PASSENGER, THE PERSON YOU'VE IDENTIFIED AS MR. RAFF, APPEAR AS IF HE'S LEANING SOMEWHAT OUT THE PASSENGER WINDOW; IS THAT RIGHT?

David Bambrick A YES, SIR.

Q I KNOW YOU – I'VE SEEN YOUR REPORT. YOU NEVER SAW HIM EXTEND HIS HAND, DID YOU?

A NO, SIR.

Q AND YOU NEVER SAW ANYTHING IN HIS HAND; CORRECT?

A NO, SIR.

Q AND YOU NEVER SAW MR. RAFF TOSS ANYTHING; CORRECT?

A NO.

Q AND, IN FACT, IMMEDIATELY AFTER YOU SAW HIM LEANING, THE CAR TURNED THE CORNER AND YOU LOST SIGHT OF IT?

A YES, SIR.

Q AND IT WAS AT THAT POINT AROUND THAT CORNER THAT YOU EVENTUALLY CAME BACK, AND YOU FOUND A FIREARM IN THAT LOCATION; IS THAT CORRECT?

[659] A YES, SIR.

Q SO YOU AREN'T ABLE TO SAY IF EITHER MR. BOWEN, THE DRIVER, OR MR. RAFF, THE PASSENGER, WHO, IF EITHER ONE OF THEM, EITHER TOSSED THAT GUN OUT OF THE CAR OR HAD ANYTHING TO DO WITH THE GUN; CORRECT?

A NO, I COULDN'T TELL YOU.

* * *